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Alabama. Supreme Court
Oct 12

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SELECT CASES

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ARGUED AND DETERMINED

IN THE

SUPREME COURT OF ALABAMA.

DURING

THE YEARS 1861-'62-'63.

REPORTED BY

JOHN W. SHEPHERD,

STATE REPORTER.

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VOLUME I.

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MONTGOMERY:

MONTGOMERY ADVERTISER BOOK AND JOB OFFICE.

1864.



OFFICERS OF THE SUPREME COURT,
DURING THE TIME OF THESE DECISIONS.

HON. A. J. WALKER, CHIEF JUSTICE.

HON. G. W. STONE, } ASSOCIATE JUSTICES.

HON. R. W. WALKER, }

6981.92-11-11. 201

M. A. BALDWIN, ATTORNEY GENERAL.

JOHN D. PHELAN, CLERK.

WARREN D. BROWN, MARSHAL.

Rec. Sept. 29. 1866

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ERRATA.

In Scott v. The State, page 25, omit last line at bottom of page.

In *Ex parte* Kelly, page 92, eighth line from bottom of page, for "*and*" read "*which were.*"

In Jemison v. Smith, page 149, second line from bottom of page, after "*transcript*" insert "*from the record.*"

In Steele & Burgess v. Townsend, page 206, last line of second paragraph, for "*nullify*" read "*multiply.*"

REPORTS

OF

CASES ARGUED AND DETERMINED

In the Supreme Court of Alabama.

BEN (A SLAVE) vs. THE STATE.

[INDICTMENT AGAINST SLAVE FOR MURDER OF ANOTHER SLAVE.]

1. *Admissibility of character of deceased, as evidence for prosecution.*
On a trial for murder, the prosecution cannot adduce evidence of the peaceable character of the deceased, when it has not been assailed by the prisoner.
2. *Dying declarations.*—The dying declarations of the deceased, respecting the state of feeling which existed between himself and the prisoner, are not competent evidence for the prosecution.

FROM the Circuit Court of Baldwin.

Tried before the Hon. C. W. RAPIER.

THE prisoner in this case, a slave, was indicted for the murder of another slave, and pleaded not guilty to the indictment. "On the trial," as the bill of exceptions states, "during the opening examination of the witnesses for the prosecution, the State proposed to prove the good character of the deceased, as a peaceable, well-behaved negro. The prisoner objected to this evidence; but the court overruled the objection, and allowed the evidence; and the State thereupon proved, that the deceased was a person of good character, was a member of the church,

and was of peaceable character; to the admission of which evidence the prisoner excepted. The prisoner offered no evidence of the character of the deceased during the trial, nor was any such evidence given in his behalf."

"During the progress of the cause, and in the opening examination of the witnesses for the prosecution, and after several witnesses had been examined as to the facts of the homicide, the master of the deceased was placed on the stand by the State as a witness, and testified, that he came to the deceased after he had received his death-wounds, and was satisfied that he would die, and told him so; that the deceased was conscious that he would die from his wounds, and so expressed himself, and directed his fellow-servants what to do with the little effects he had; that this was early in the morning, and that the deceased died on the following evening, about night. The State then proposed to give in evidence the declarations of the deceased to his master, respecting the state of feeling between himself and the prisoner. The prisoner objected to the introduction of this evidence; but the court overruled the objection, and admitted the evidence. The master thereupon testified, that the deceased said, 'he was knocked down, but did not know who did it; that some time before he had met the prisoner, (who was a runaway,) near the premises of his master, and told him that he had better go home, and that he would tell his master if he did not; to which the prisoner replied, that he intended to do so the next day.' To which ruling and admission of evidence the prisoner excepted."

SMITH & CHANDLER, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

The opinion of the court was delivered, Feb. 16, '61, by A. J. WALKER, C. J.—It has been decided in this State, that the bad character of the deceased is competent evidence for the accused, where the circumstances are such that they would be illustrated by such character.

The reason upon which that decision rests, is, that the slayer must be reasonably presumed to act upon the circumstances surrounding him, as they are colored by the bad character of the deceased; and that, therefore, it is but just to the accused that the jury should know that character. We do not think that this reasoning requires us to hold, that the State may go into evidence of the peaceable character of the deceased, when it is not assailed on the part of the accused. If the character of the deceased was that of a peaceable man, the circumstances may safely be left to speak their own language: it is not requisite to their interpretation that the character should be known.

The character of a witness for truth cannot be supported, until it has been assailed; and, on the other hand, the character of one charged with a criminal offense, can not be assailed, except in reply to evidence of good character. These cases show that, in holding the bad character of the deceased admissible for the accused, and denying that good character is admissible for the State, we have analogies in the law to support us. We think it much safer not to extend the rule, in reference to the admissibility of the character of the deceased, so far as to permit the State to adduce primarily evidence of good character. The authorities, with the exception of *Dukes v. State*, (11 Ind. 557,) to the report of which we have no access, give the rule no greater extension, than to embrace evidence of bad character adduced by the defendant; and we think it safer to so limit the rule.—*State v. Hicks*, 27 Miss. 588; *Monroe v. State*, 5 Georgia, 137; *State v. Tacket*, 1 Hawks, 216; *State v. Barfield*, 8 Iredell's Law, 344; *Wharton on Hom.* 249; *Franklin v. State*, 29 Ala. 14; 3 Greenleaf on Ev. 27.

[2.] The court erred, in permitting the State to give in evidence the dying declaration of the deceased, as to the state of feeling existing between himself and the prisoner. We decided in *Mose v. State*, (35 Ala. 421,) that the admissibility of dying declarations was restricted to statements "as to the circumstances immediately attending

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the act, and forming a part of the *res gestæ*." That decision is conclusive of the question now presented.

Judgment reversed, and cause remanded. The prisoner must remain in custody, until discharged by due course of law.

AARON (A SLAVE) vs. THE STATE.

[INDICTMENT AGAINST SLAVE FOR MURDER OF WHITE PERSON.]

1. *Competency of juror*.—A mere occupant and tenant, under a yearly letting, of a room used by him as a sleeping apartment, is not a *freeholder*, within the meaning of the statute (Code, § 3583) specifying the grounds of challenge to jurors in criminal cases.
2. *Admissibility of confessions*.—The constable who had the custody of the prisoner, a slave, having said to him, "If you did it, you had better confess: it would be best for you to tell the truth; truth is always the best policy; but, if you did not kill him, we don't want you to say so,"—*held*, that there was nothing in these facts to show that the prisoner's confessions, subsequently made to the constable in the same conversation, were elicited through the influence of either hope or fear; and that the confessions were admissible evidence.
3. *Organization of grand jury; sufficiency of certified transcript on change of venue*.—Where the regular term of the circuit court commenced on the second Monday after the fourth Monday in *October*, which was the eighth day of *November*; and the indictment, as copied into the certified transcript on change of venue, purported to have been returned into court on the ninth day of *November*; while the transcript stated, in its caption, that the grand jury was organized at a term of the court begun and held on the second Monday after the fourth Monday in *November*, which was the sixth day of *December*,—*held*, that the transcript did not show that the grand jury was organized at the regular term of the court; but, if a wrong date was inserted in the transcript by a clerical misprision, (there being a reversal of the judgment on other grounds,) the mistake may be corrected before another trial.
4. *Variance in name of deceased*.—Where the indictment alleged the name of the deceased to be Louis *Boudet*, or *Boredet*, while his real name was proved to be Louis *Burdet*, and to be sometimes pro-

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nounced as if spelt *Bouredet*; and the circuit court thereupon charged the jury, "that if his real name was the same in sound as if written *Boudet* or *Boredet*, or so nearly the same that the difference would be but slight, or scarcely perceptible, and he would have been readily known by his name being pronounced as if written *Boudet* or *Boredet*, then the variance would not avail the defendant,"—held, that the ruling of the court was substantially correct.

From the Circuit Court of Mobile, on change of venue from Baldwin.

Tried before the Hon. C. W. RAPIER.

THE prisoner was indicted, jointly with another slave, in the circuit court of Baldwin, for the murder of one Louis Boudet, (or Boredet, as the court decided, on inspection, it might be,) a white man. The venue having been changed to Mobile, the prisoner was there tried alone, at the December term, 1860. During the organization of the jury, as is shown by the bill of exceptions, A. R. Drish, one of the regular panel of jurors, being examined touching his qualifications as a juror, "stated, that he was not a freeholder; but that he rented a room by the year, and occupied it as a lodging-room; and that he exercised the exclusive control of said room, and had occupied it thus for more than a year." The prisoner challenged this juror, on the ground that he was neither a freeholder nor a householder; the court overruled the objection, and the prisoner excepted. An exception was also reserved to the ruling of the court in admitting one Hannibal Choate as a competent juror, on a similar state of facts; and several other exceptions, which require no particular notice, were reserved during the organization of the jury.

When the State offered to read to the jury the copy of the indictment contained in the certified transcript, "the prisoner objected to being put upon his trial on said copy-indictment, and objected to the same being read to the jury as a sufficient indictment, and objected to the introduction of said transcript; because said transcript showed that the court commenced its session at a time

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not appointed for a regular term; and because it contained no caption showing the organization of a grand jury at the regular term of said court; and because it did not appear that said indictment was found at a regular term of said court; and because it appeared that said indictment was filed in court before the organization of the grand jury." The transcript states, in its caption, that the proceedings were had "at a term of the circuit court, begun and held in and for the county of Baldwin, at the court-house thereof, on the second Monday after the fourth Monday of November, 1858;" and then sets out the organization of the grand jury. The next minute-entry, which is headed, "Tuesday, November 9, 1858," recites that the grand jury return into court, and file sundry bills of indictment; and then follows the indictment against the prisoner, which is entitled 'Fall term, 1858,' and endorsed by the clerk, 'Filed in open court, 9th November, 1858,'" The court overruled the several objections to the indictment and transcript, and the prisoner excepted.

The deceased was killed on the 20th or 21st April, 1858. The prisoner was at that time a runaway, and did not return home for several days afterwards. When he returned, (suspicion having been aroused in the meantime against him and another slave, Ranty by name,) he was seized and tied by his overseer, and delivered up to a magistrate, by whom he was examined touching the murder of the deceased; but on that examination he denied all participation in the killing. He was left, during the night, in the custody of one Nelson, who was acting as constable, and who kept him bound with handcuffs and a chain. On the next morning, while Nelson, accompanied by several other persons, was carrying him to the place appointed by the magistrate for the further investigation, and while he and Nelson were twenty or thirty yards in advance of the rest of the party, he made a confession of his guilt; and immediately afterwards, while the whole party were going down the river in a boat, repeated the confession in the presence of the other

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persons. One of the handcuffs had swollen his wrist, and Nelson took it off; but it does not appear whether this was before or after the first confession. The State first introduced one Eelava as a witness, who was one of the party with the constable on that occasion, and who testified that, "on the morning of the next day after Aaron's first examination, while going down the river in a boat, with him and several other persons, Aaron made a statement to him, about the killing of the deceased, implicating himself; and that this statement was made in reply to a question by him, 'how he came to tell about the matter,' alluding to his confession, just before, to Nelson. The solicitor asked the witness, whether he held out any inducement to the prisoner to confess, or used any threats, force, or undue influence; and the witness said, that he had not. The solicitor then asked the witness to state what the prisoner said to him; but the prisoner, by his counsel, objected to this, because it did not appear that, at the time this confession was made, the influence of the oath and charge given to him had been removed. The court overruled the objection, and the prisoner excepted." The prisoner then introduced Nelson as a witness, who testified to the court, in reference to the confession made to him, as follows: "While he and Aaron were about twenty-five or thirty yards in advance of the others, and were in conversation about the matter of the homicide, witness said to Aaron in substance, as well as he could recollect, 'If you did it, you had better confess: it is best to tell the truth; but, if you did not do it, we don't want you to say so.' On re-examination touching this conversation, the witness stated that he said to the prisoner, 'If you killed him, you had better confess; it would be best for you to tell the truth: truth is always the best policy. But, if you did not kill him, we don't want you to say so; if you did, it is best for you to confess and acknowledge it.' When witness made these statements to Aaron in said conversation, Aaron walked on a little way, saying nothing, and apparently reflecting, and then made the confession. No one else was then present, but

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the others soon came up." The prisoner then introduced as witnesses, before the court, the agent of his owner, who had the control and management of him, and his overseer; who testified to the facts above stated, in reference to his being a runaway at the time the homicide was committed, his return home, his arrest by the overseer, and his delivery to the magistrate. On these facts, the court admitted as evidence to the jury, against the prisoner's objections, the confession to Eslava, and the prior confession to Nelson; to which decisions the prisoner reserved exceptions. The State then adduced evidence corroborating the confessions in several particulars.

In reference to the name of the deceased, the testimony was as follows: Eslava testified, "that the deceased was a Swiss, and was named Louis *Burdet*; that he spoke French, and pronounced his name according to the French pronunciation; that he (witness) had seen the deceased write his name, and pronounced it as the deceased did." Joseph Nelson testified, "that he knew the deceased, who was generally called Louis *Burdet*, pronouncing the surname as in English." Mr. Weeks testified, "that he knew the deceased, and that his name was Louis *Burdet*, giving the French pronunciation." Joseph Hall testified, "that he knew the deceased, who was generally called by his christian name, Louis; that he had several times heard his name called out at the polls where he voted, and that it was then pronounced, to the best of his recollection, as if written *Bouredet* according to English orthography; that he did not know what was the correct pronunciation of his name, because he was generally called 'Old Louis.'" The court decided, on inspection, aided by the testimony of several experts, that the name, as written in the indictment, might be either *Boudet*, or *Boredet*, and might be pronounced as if spelt *Boodet*, or *Bowdet*; and instructed the jury, "that if the real name of the deceased was the same in sound as if written *Boudet* or *Boredet*, or so nearly the same that the difference would be but slight, or scarcely perceptible, and he would have been readily

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known by his name being pronounced as if written *Bou-det* or *Boredet*,—then the variance would not avail the defendant for his acquittal;” to which charge the prisoner excepted.

JAMES BOND, and L. S. LUDE, for the prisoner.—1. Drish and Choate were not competent jurors, being neither freeholders nor householders.—Code, §§ 3486, 3583. The object of the statute, in requiring householders and freeholders as jurors, is recited to be the securing of “honesty, impartiality, and intelligence;” and its purpose will inevitably fail, at least in the cities and large towns, if the mere renting of a room be held sufficient to constitute a householder. Where rooms are rented by gamblers and other disreputable characters, such renting gives not the slightest assurance of honesty or intelligence. To effectuate the object of the statute, the term *householder* should be construed to mean, one who holds, or has possession of a house—who has some stake in the community, and whose reputation may be known. If the prisoner was tried by jurors who had not the requisite qualifications, the judgment will be reversed.—1 Porter, 298; 2 Mason, 91; 1 Johns. 815; 8 Johns. 847; 8 Ala. 302; 4 Barn. & Ald. 472; 3 Iredell, 582.

2. The certified transcript, on which the prisoner was tried, was fatally defective. The regular fall term, 1858, of the circuit court of Baldwin, commenced on the 8th day of November, as this court must judicially know; yet the transcript states, that the grand jury was organized on the 2d Monday after 4th Monday in November. If this statement is true, the indictment was not found by that grand jury, or the grand jury itself was organized at an unauthorized time.

3. The prisoner's confessions ought not to have been admitted as evidence against him. The circumstances under which those confessions were made, as detailed in the bill of exceptions, show that they were extorted from him by the two-fold influence of hope and fear. The prisoner is a slave, ignorant of the law, and accustomed

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to implicit obedience. The confessions were made to a white man, an officer of the law, in whose custody he was, and in response to a question by that officer; and at a time, too, when he was bound in irons, and in the midst of an excited party of white men who were investigating the facts of the homicide. If he had failed to answer the question, his silence would have been considered disrespectful; and if he had given the same answer as on his former examination, it would not have been accepted as satisfactory. The officer did not caution him that what he said would be used as evidence against him, nor can he be presumed to know that fact. The remarks of the officer, in reply to which the first confession was made, could only be construed by him as a threat, if he did not confess, or a promise that he could thereby better his condition. His former denial was not satisfactory to the party, and he must have seen that nothing short of a confession of his guilt would satisfy them. If these facts are not sufficient to show, affirmatively, that the confessions were not voluntary, they at least raise grave doubts of their entire freedom.—State v. Long, 1 Hayw. 455; Wharton's Amer. Crim. Law, 252; 1 Greenl. Ev. § 225, and notes; 32 Ala. 566; 26 Ala. 107; 25 Ala. 1. An additional ground of objection, which is, of itself, sufficient to exclude the confessions, is the fact that the prisoner had been previously sworn and examined during the investigation, and was then charged by the magistrate, as the statute directs, (Code, §§ 3318, 3315,) concerning the consequences and punishment of false swearing; and it was not shown that, at the time the confessions were made, the influence and effect of this oath and charge had been removed from his mind: on the contrary, the confession itself shows that they still dwelt upon his mind. Confessions have been repeatedly excluded, because the prisoner had been examined upon oath.—1 Greenl. Ev. § 225; Bull. N. P. 242; 4 Hawk. P. C. ch. 46, § 37; 4 C. & P. 564; 6 *ib.* 161, 179; 1 Moody & Rob. 297; 1 Moody, 208; 1 Parker's Crim. R. 406–23; 4 Dallas, 116; 1 Phil. Ev. 113, note 207, 2d vol.; Roscoe, 48–50.

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4. The charge of the court to the jury, on the question of variance, was erroneous. The rule of law as to *idem sonans* cannot apply to names so dissimilar in sound as *Burdet* and *Boudet*, or *Boredet*.—*Rex v. Tannet*, Russ. & B. 351; 10 East, 88; 5 Taunton, 14; Roscoe, 106. *Idem sonans* is a question of law, and the court erred in referring its decision to the jury.

M. A. BALDWIN, Attorney-General, *contra*.—1. Drish and Choate were householders, within the spirit and intention of the statute.

2. The objection taken to the certified transcript, is but a clerical mispision, which was amendable by the other parts of the record.

3. The prisoner's confessions appear to have been made voluntarily, and were abundantly corroborated. That they were admissible, see *Hawkins v. State*, 7 Missouri, 190; Roscoe's Crim. Ev. 42.

4. There was no variance in the name of the deceased. 17 Ala. 179.

The opinion of the court was delivered, Feb. 18, '61, by STONE, J.—The jurors Drish and Choate were mere tenants and occupants, by yearly letting, of rooms used as sleeping apartments. The section of the Code, which defines the qualifications of jurors, declares that it is a good ground of challenge for either party, "that the juror has not been a resident householder or freeholder of the county, for one year preceding the time he is sworn."—§ 3583. The term "householder" is defined by Mr. Webster to mean, "the master or chief of a family; one who keeps house with his family." "Household: those who dwell under the same roof, and compose a family." In the case of *Brown v. Witt*, (19 Wend. 475,) Bronson, J., said, "The word *householder*, in this statute, means the head, master, or person who has the charge of, and provides for a family." "A person having and providing for a household, is a householder."—*Griffin v. Sutherland*, 14 Barb. Sup. Ct. 156. See, also, *Rex v. Inhabitants of*

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Rufford, 8 Mod. 40; Slade's bail, 1 Chitty, 502; Rex v. Poynder, 1 B. & Cross. 178; 8 Petersdorff's Abr. 108. Householder, in our statute, means something more than the mere occupant of a room or house. It implies in its terms the idea of a domestic establishment—of the management of a household.—*Salie v. Waters*, 17 Ala. 482; *Boykin v. Edwards*, 21 Ala. 261; 2 Mart. La. 313; Burrill's Law Dictionary, "Household." Under this rule, Messrs. Drish and Choate were not competent jurors; and for the error in putting them upon the prisoner, this case must be reversed.

The questions as to the other two jurors will probably not arise again in their present form.

[2.] Much has been written on the question, what degree of influence will exclude the evidence of confessions in criminal cases? The authorities agree, that, before any confession can be received in evidence in a criminal case, it must be shown that it was voluntary. "A free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the strongest sense of guilt, and therefore it is admitted as proof of the crime to which it refers; but a confession forced from the mind, by the flattery of hope, or by the torture of fear, comes in so questionable a shape, when it is to be considered as the evidence of guilt, that no credit ought to be given to it; and therefore it is rejected."—1 Greenl. Ev. § 219; *Mose v. The State*, 83 Ala. 211; *Roscoe's Cr. Ev.* 39; *Wyatt v. The State*, 26 Ala. 9; *Brister v. The State*, 26 Ala. 107, 128; *Seaborn v. The State*, 20 Ala. 15; *Reg. v. Waringham*, 2 Lead. Cr. Cas. 167; 2 Russ. on Crimes, 827. See, also, 2 Lead. Cr. Cases, 190, 191, and 198, *et. seq.*

In some cases, we think the rule which excludes confessions, as being procured by hopes held out, or fears excited, has been carried to the verge of propriety, if not beyond it. In *Reg. v. Drew*, (8 C. & P.) the language used was, "Do not say anything to prejudice yourself, as what you say I will take down, and it will be used for or against you at the trial." We confess we cannot perceive on what principle this confession was excluded. So, in the

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case of *Reg. v. Morton*, (2 Mood. & Rob. 514,) where the language was, "What you are charged with is a very heavy offense, and you must be very careful in making any statement to me or any body else, that may tend to injure you; but any thing you can say in your defense, we shall be ready to hear, or send to assist you." In each of these cases, the decision was pronounced by Coleridge, J. In the case of *Rex v. Upchurch*, (1 Moody, 465,) a hope was held out to the prisoner, that a confession would perhaps save her neck; and we think the ten judges—Lord Denman, Ch. J. Tindal, Lord Abinger, Ch. B. Park, and others—rightly ruled her confessions inadmissible.

Although we fully approve the sentiment expressed by this court in the case of *Wyatt*, *supra*, that, "in considering questions of the kind before us, we must bear in mind" the dependent relation of the slave—the absolute dominion under which he lives," (see, also, *Clarissa's* case, 11 Ala. 60,)—yet, we agree with Parke, B., "that cases on this subject have gone quite far enough, and ought not to be extended,"—*Reg. v. Moore*, 12 Eng. Law and Eq. 586. In *Seaborn's* case, the confession was made to the committing magistrate, after he had told the prisoner, (a slave and in custody,) that it was a bad business, or bad situation he was in.—20 Ala. 15. The confession was held admissible. See, also, *Reg. v. Baldry*, 2 Lead. Cr. Cases, 164; *Hawkins v. The State*, 7 Missouri, 190.

The substance of what the bailiff said to the prisoner in this case was, that truth was the best policy: that if he did the act, it was best to confess it; but, if he did not do the act, then there was no wish he should say so. Now, if there be in this language any inducement offered to the prisoner to obtain a confession, that inducement was placed on the express condition that he, the prisoner, was guilty. Hence, to suppose that the prisoner was influenced by the declaration to make the confession, is to concede his guilt; for, in no other contingency, was he advised to confess. The prisoner, if innocent, was warned not to say he had done the deed, in language equally as strong as that which sought his confession if guilty.

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Truth was asked for; and we cannot perceive that any hope or fear was offered to the prisoner, to induce him to make a false confession of guilt. The circuit court did not err in receiving evidence of the confessions.

[8.] The transcript from the circuit court of Baldwin county presents the following state of facts: The regular term of the circuit court of that county sat on the second Monday after the fourth Monday in October, and commenced its session on the 8th day of November, 1858. The indictment, on which the prisoner was tried, appears to have been returned into court on the 9th day of November, 1858. The transcript from Baldwin states, that a grand jury, composed of certain named persons, was organized in a Baldwin circuit court, on the 2d Monday after the 4th Monday in November, 1858, which was the sixth day of December. The transcript from Baldwin circuit court fails to show the organization of the grand jury at the fall term, 1858, unless there is a mistake in the date found in the record. We suppose the date is incorrectly stated; but, as the record before us fails to show the organization of the grand jury by whom the bill was found, and as we suppose this to be a clerical error, which can be corrected, we will do no more than call the attention of the circuit court and the parties to it, that before another trial the transcript may be put in proper form.

[4.] The ruling of the court in reference to the name of the deceased is substantially correct. We understand the circuit court to have said, in substance, that if the variance in the name be so slight as scarcely to be perceptible, and the deceased would have been readily known by the name thus called, then such variance was immaterial. In the case of *Ahitbol v. Beniditto*, the court ruled, that *Benedotto* was *idem sonans* with *Beniditto*.—2 Taunton, 401. See, also, *Ward v. The State*, 28 Ala. 60; *Doe. ex dem. v. Miller*, 1 B & Ald. 699.

Judgment of the circuit court reversed, and cause remanded. Let the prisoner remain in custody, until discharged by due course of law.

SCOTT vs. THE STATE.

[INDICTMENT AGAINST SLAVE FOR HOMICIDE OF WHITE PERSON.]

1. *Sufficiency of clerk's certificate to transcript, on change of venue.*—On change of venue in a criminal case, if the clerk's certificate, appended to the transcript, states that it "contains a true and complete transcript of the caption of the grand jury, and a copy of the indictment, with the endorsements thereon, together with the recognizances of the witnesses, and all the orders and judgments had in the case, all of which is as full and complete as the same appears of record,"—this is a substantial compliance with the requirements of the statute, (Code, § 3618.)
2. *Service of copy of indictment on prisoner.*—If a copy of the indictment, as originally found by the grand jury, is served upon the prisoner while in confinement, (Code, § 3576,) the validity of the service is not affected by the fact that a *nolle-prosequi* had been entered as to one of the counts.
3. *Charge to jury as to construction and effect of other charges.*—Where the court, after having charged the jury orally, gave several charges in writing at the request of the defendant, and then added, "that the jury would receive the written charges, in connection with the charges and law as given and expounded orally from the bench, as the law of the case,"—*held*, that this was not erroneous.
4. *Homicide of white person by slave; charge to jury, as to constituents of offense.*—On the trial of a slave, under an indictment for the murder or voluntary manslaughter of a white person, a charge to the jury, asserting that, "if they believed the defendant struck the deceased with no expectation or intention to kill him, and the stroke did kill him, the death was accidental, and the defendant should be acquitted,"—is erroneous, since it assumes that the defendant would be entitled to an acquittal, although the blow was given with the intention to do great bodily harm.
5. *Sufficiency of verdict.*—Under an indictment against a slave, charging him, in separate counts, with the murder and voluntary manslaughter of a white person, a general verdict of guilty is sufficient to authorize a judgment and sentence of death.

FROM the Circuit Court of Dallas, on change of venue from Wilcox.

Tried before the Hon. PORTER KING.

THE indictment in this case was found by the grand

jury of Wilcox county, and originally contained three counts: the first charging the prisoner, who was a slave, with the murder of James Wilkinson, a white person, by striking him with a stick or piece of wood; the second charging that the killing was done "unlawfully, but without malice"; and the third, that it was done "unlawfully, but without malice, or the intention to kill." A *nolle-prosequi* was entered as to the third count, and the venue was afterwards changed, on the application of the prisoner, to Dallas county. On the trial, as the bill of exceptions states, "the prisoner objected to being tried on the transcript of the record from the circuit court of Wilcox, because of the insufficiency of the clerk's certificate to the said transcript; which objection the court overruled, and the prisoner excepted." The certificate is in the following words:

"State of Alabama, } I, C. C. Sellers, clerk of the
Wilcox county. } circuit court of Wilcox county,
State of Alabama, do hereby certify, that the foregoing
pages, numbered from one to four, contain a true and
complete transcript of the caption of the grand jury, and
a copy of the indictment, with the endorsements thereon,
together with the recognizance of the witnesses, and all the
orders and judgments had in the case of the State against
Scott, a slave, together with a bill of the costs; all of
which is as full and complete as the same appears of
record or on file in my office Given under my hand
and seal of office," &c.

The prisoner then objected to being tried, "because the paper which had been served upon him, while he was confined in jail, as a copy of the indictment, was not a correct copy of the same; and produced to the court the paper which had been so served on him," which was a correct copy of the original indictment, including the count as to which a *nolle-prosequi* had been entered before the change of venue. The court overruled the objection, and the prisoner excepted.

The circumstances connected with the killing, as proved

on the trial, were substantially these: On the night of the 19th January, 1860, the prisoner was caught by a patrolling party, of whom the deceased was one, in the town of Camden, about a half-mile from his master's house, without a pass; and the deceased, under the direction of the captain of the patrol, inflicted on him a light whipping. On the next morning, while the deceased, in company with two other white persons, was going through the suburbs of the town, he passed the prisoner, who immediately accosted him in a rude and insolent manner, and followed the party into the town, talking in a loud and insolent tone to the deceased. "The deceased told him to go away and let him alone, and threw a chip at him, but did not hit him. The defendant continued to talk angrily to the deceased, saying, 'I don't see what business school-boys have to patrol, any way;' and the deceased threw at him a piece of a wagon-felloe, some three inches long, and then a piece of a buggy-shaft, with a [part] of the cross-bar attached, but did not hit him. One Ratcliffe, who was at work in his carriage-shop as they passed, and who was attracted to the door of his shop by the loud and angry talking, threw or handed to the deceased a buggy-whip, of medium size, and told him to take it and whip the defendant. The defendant seized upon the piece of buggy-shaft which the deceased had thrown at him, and he and the deceased mutually started towards each other, (being then some twelve or fifteen steps apart,) and met about half-way; and the deceased then struck the defendant around the body with the whip, and the defendant struck him on the left forehead with the buggy-shaft." From the effects of this blow the deceased died, on the second day afterwards.

"After the court had charged the jury orally, the defendant asked the court to give six charges in writing, which charges the court also gave, and then stated to the jury, that they would receive the written charges, in connection with the charges and law as given and expounded orally from the bench, as the law of the case; to which defendant sold liquors at his bar, had a regular license from

statement, so made by the court, the defendant excepted."

"The defendant asked the court, in writing, to charge the jury, 'that if they believed the defendant struck the deceased with no expectation or intention to kill him, and the stroke did kill him, the death was accidental, and the defendant should be acquitted;' which charge the court refused to give, and the defendant excepted."

The jury returned a verdict of "guilty of murder, in manner and form as charged in the indictment;" and the court thereupon pronounced sentence of death upon the prisoner.

GEORGE W. GAYLE, for the prisoner.—1. The certificate of the clerk, appended to the transcript, does not state that it contains "the order for the removal of the trial," nor that it contains "all the entries relating" to the indictment.—Code, § 3618; Brister's case, 26 Ala. 126.

2. The paper served on the prisoner was not a copy of the indictment on which he was to be tried, since it contained the count as to which a *nolle-prosequi* had been entered. The unauthorized addition of a count makes as material a difference as would the omission of a count. In the one case, a conviction might be had upon a count which the prisoner had never seen; and in the other, upon a count which was void. If the paper served on the prisoner be held a copy of the indictment on which he was tried, then it must follow that he was tried, and probably convicted, on the third count; indeed, there is nothing in the record to repel this conclusion.

3. The court erred in the statement voluntarily made to the jury after giving the charges asked by the prisoner. If the charges asked were correct, it was the duty of the court to give them in the language in which they were asked.—Code, § 2355. If they were incorrect, or in conflict with the oral charge, they ought not to have been given. The statement of the court could only be understood by the jury as an intimation that they must be governed by the oral charge, and that the other charges

were given merely to save an exception.—*Spivey v. The State*, 26 Ala. 90.

4. The charge asked and refused, ought to have been given. It was obviously intended to withdraw from the jury the consideration of the third count. Moreover, it asserts a correct legal proposition. No one but the master has a right to punish or strike a slave. Words do not justify an assault. The deceased unlawfully assaulted the prisoner, and the latter had the right to resist and protect himself. If the stroke was given without any "expectation or intention to kill," the defendant could not be convicted of murder, voluntary manslaughter, or involuntary manslaughter in the commission of an unlawful act.

5. The general verdict was erroneous, and did not authorize the sentence pronounced. The two counts in the indictment charge different offenses, or, at least, one offense with essential differences. The offense is alleged to have been committed "with malice," and yet "without malice;" and the verdict finds this impossibility to be true. The finding is contradictory, confused, false, and uncertain.—*State v. Givens*, 5 Ala. 760; *State v. Cochran*, 30 Ala. 542; 6 Ohio, 400; 4 Gill, 490.

M. A. BALDWIN, Attorney-General, *contra*.—1. The clerk's certificate is a substantial compliance with the statute.

2. The copy of the indictment, served on the prisoner, was an exact copy of the original; and he could not possibly have been injured by the insertion of the third count.

3. The oral charge of the court, not being set out in the bill of exceptions, must be presumed to have been consistent with the written charges which were given; and it was the duty of the jury, without any express instruction from the court, to consider them together "as the law of the case." Moreover, it is the right and duty of the court to give explanatory charges.—*Morris v. State*, 25 Ala. 57.

4. The charge refused was manifestly erroneous, in assuming that, if the blow was given with the intention to do great bodily harm, the defendant was entitled to an acquittal.

The opinion of the court was delivered, Feb. 28, '61, by R. W. WALKER, J.—The certificate of the clerk, attached to the transcript from the circuit court of Wilcox county, was a substantial compliance with the requirements of section 3618 of the Code; and, as the only objection made to the transcript, was because of the insufficiency of the certificate, the court did not err in overruling it.

[2.] The copy of the indictment served on the defendant, was a copy of the indictment as found by the grand jury; and that, we think, was sufficient, although the solicitor had entered a *nolle-prosequi* as to one of the counts.

[3.] If, after the court has charged the jury orally, additional charges are given in writing at the request of either party; it is certainly true that the jury are to consider the written, in connection with the oral charges, as constituting the law of the case. This was all that the court said to the jury in the present case, and we do not see how the remark could have prejudiced the defendant.

[4.] The last charge asked, was properly refused. If the blow was given with the intention not to kill, but to do great bodily harm, and death ensued, it by no means follows, that the defendant was entitled to an acquittal. Yet the charge asked by the defendant, declares that, in the case supposed, it would be the duty of the jury to acquit.

[5.] Under our code, murder, when committed by a slave, and the voluntary manslaughter of a white person by a slave, are subjected to the same punishment.—Code, § 8312. The first and second counts of the indictment in this case, allege the killing of the same person, and obviously refer to the same act, charging it in different ways, so as to meet the different aspects in which it might be

presented by the evidence. It is very clear that, where both counts of the indictment refer to a single transaction, and the punishment prescribed is the same in the one case as the other, a general verdict of guilty is not improper.—1 Archb. Crim. Pl. 175-6; Hudson v. State, 1 Blackf. 319; U. States v. Pirates, 5 Wheat. 184; Mays v. State, 80 Ala. 323.

Judgment affirmed.

STEIN vs. THE STATE.

[INDICTMENT AGAINST LESSEE OF CITY WATER-WORKS.]

1. *When indictment lies for breach of duty imposed by contract, and its sufficiency.*—An indictment lies against the lessee of the city water works of Mobile, for a breach of the public duty imposed on him by his contract with the corporate authorities, in failing to furnish the city with a supply of water; but, since his contract only binds him to supply water to the city from Three-mile creek, and contains no stipulation as to the quality of the water to be supplied, an indictment which simply charges, in effect, that the water supplied by him was not good and wholesome, shows no breach of duty resulting from the contract.
2. *When indictment lies for nuisance, and its sufficiency.*—Selling and furnishing unwholesome and poisonous water to an entire community, is a nuisance, for which an indictment will lie; but, if the indictment does not allege that the defendant, his agents or servants, poisoned the water, or imparted to it its unwholesome quality, it must aver his knowledge of its unwholesome or poisonous quality.
3. *Relevancy of evidence to prove nuisance.*—Under an indictment for a nuisance, in selling and furnishing unwholesome and poisonous water to an entire community, the prosecution may adduce evidence, showing the deleterious effects of the water on particular persons, members of the community, not named in the indictment.
4. *Admissibility of slave's declarations.*—The declarations of a slave, complaining of sickness, and detailing his symptoms, are compe-

tent evidence on the principle of *res gesta*, as well as from the necessity of the case, though made to a person who is not a physician.

From the Circuit Court of Baldwin.

Tried before the Hon. O. W. RAPIER.

THIS case originated in Mobile county, and was removed to Baldwin county on the application of the defendant. The fifth count of the indictment, on which alone the trial was had, was in these words: "The grand jury of said county further charge, that, before the finding of this indictment, an agreement was entered into, on the 26th December, 1840, between the mayor, aldermen, and common council of the city of Mobile, of the first part, and the said Albert Stein, of the second part; which agreement was in tenor as follows,"—setting out the agreement, hereinafter more particularly referred to, by which Stein leased the city water-works of Mobile; "which agreement was duly executed, on the day the same bears date, by the said party of the first part and the said party of the second part, and was confirmed by an act of the legislature of the State of Alabama, approved January 7, 1841, in tenor as follows,"—setting out the act, entitled "An act for the promotion of the health and convenience of the city of Mobile, by the introduction of a supply of wholesome water into said city, to be used for domestic purposes and the extinguishment of fires," which may be found in the Session Acts of 1840–41, on pages 53, 54. "And the grand jury further find, that the said Stein, for certain valuable considerations expressed in said agreement, promised and agreed, among other things, to supply the said city of Mobile and the inhabitants thereof with good and wholesome water, which promise and agreement was confirmed by the said act of the legislature, approved January 7, 1841, hereinbefore set out. And the grand jury further find, that the said Stein, in pursuance of the said agreement and said confirmatory act, accepted the right and franchise therein conveyed and granted, and, under said agreement and act, has, for a number of years, to-wit, ever since the

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year 1843, collected and received water-rates, or rents, from the inhabitants of said city, amounting to a large sum, to-wit, the sum of \$100,000, and does yet collect and receive water-rates from the inhabitants of said city; and that the said Stein, by reason of said agreement and said confirmatory act, and of his acceptance thereof, as hereinbefore averred, became liable and bound, and still is liable and bound, to supply said city and its inhabitants with good and wholesome water, as hereinbefore averred. And the grand jury further find, that there were and are, in said city of Mobile, a large number of inhabitants, to-wit, thirty thousand, and a large number of taverns, hotels, restaurats, and places of entertainment for the public, where all the citizens of said State have been and are now accustomed, and had and have a right, to stop, stay, and tarry; to-wit, five taverns, five hotels, five restaurats, and five places of entertainment for the public. And the grand jury further find, that the said Stein has heretofore wholly failed and neglected, and does still fail and neglect, to supply the said city and its inhabitants with good and wholesome water; but, on the contrary, that the said Stein unlawfully did, at divers times, from the year 1843 to the finding of this indictment, and does now, sell and dispose of, to Nelson Walkley and others, inhabitants of said city, and to all the citizens of said State stopping, staying, and tarrying at the said taverns, hotels, restaurats, and places of entertainment for the public, unwholesome and poisonous water, and did and does receive pay for the same; to the great injury of the said Nelson Walkley and his family, and to the common nuisance of the said inhabitants of Mobile, and of all the citizens of the said State stopping, staying and tarrying at the said taverns, hotels, restaurats, and places of entertainment for the public; against the peace and dignity of the State of Alabama."

The contract, above referred to, by which Stein leased the city water-works of Mobile from the corporate authorities, contained the following stipulations: The parties of the first part leased and granted to Stein, for

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twenty years, "the sole privilege of supplying the city of Mobile with water from Three-mile creek," together with all the rights, benefits and advantages, accruing to them under the several acts of the legislature and ordinances of the city relative to the city water-works; and covenanted and agreed with him, that he should have quiet possession during the period of his lease, with power to collect water-rates, at the prices named in the contract, "and power and authority to conduct the water from any part of Three-mile creek, so that the same may be good and wholesome;" and that they would pay him, at the expiration of the lease, the value of the works which he might erect, to be fixed by arbitration. Stein, on his part, covenanted to commence the erection of the necessary works within one month after the ratification of the contract by an act of the legislature; to introduce the water into the city, within two years from the date of the contract, "so that the said city and its inhabitants may, at all times, be supplied with such a quantity of water as may be produced, through the said pipes as far as they are laid;" to furnish a certain number of water-plugs for the use of the city, free of charge; and to deliver up the works, at the expiration of his lease, at their value as fixed by the arbitrators. The act of the legislature, above referred to, confirmed and ratified this agreement, and granted to Stein all the rights, privileges and immunities, which had been previously granted to the corporate authorities of Mobile, and to the old Mobile Aqueduct Company.

The defendant demurred to the fifth count of the indictment, and assigned the following grounds of demurrer: "1st, because no criminal knowledge of the character of the water is set out; 2d, because the character of the water, or that which makes it poisonous or unwholesome, is not set out; 3d, because the contract does not require Stein to furnish 'good and wholesome water,' as charged, but only water from the Three-mile creek, and it is not charged that better water could be furnished from said creek, or that there has been any default in

this respect; 4th, because the names of the persons sold to, are not properly set out; and, 5th, because the matter charged is not an indictable offense." The court overruled the demurrer, and the defendant excepted.

It appeared on the trial, as the bill of exceptions shows, that leaden pipes were used by the defendant in the distribution of water through some of the streets of the city; and it was contended, on the part of the prosecution, that this rendered the water unwholesome and poisonous. "The State proved by Walkley, who was a practicing physician and chemist, that several persons, who drank water supplied to him by the defendant, through his hydrant, were affected with a disease, which had all the symptoms of 'lead colic,' and which he considered 'lead colic;' and evidence was offered tending to show, that said disease was caused by drinking the water from said leaden pipes. Walkley gave the symptoms, diagnosis and treatment of lead colic, and said, that paralysis of the hands and arms was one of the most certain symptoms; and he gave an analysis of the water, and much other testimony tending to show that said water was unwholesome and poisonous by reason of the lead. The State then offered one Bruce as a witness, who was not a physician, and who testified, that three of his children had been sick and paralyzed, when they drank water from his hydrant, in another part of the town; that they recovered on ceasing to drink it, became again sick and paralyzed on again drinking it, and again recovered on ceasing to drink it. The defendant objected to this evidence—1st, because he was not indicted for selling poisonous water to Bruce, and his case was not mentioned in the indictment; and, 2d, because special and particular cases of injury, not alleged in the indictment, could not be proved in this case. The court overruled the objections, and admitted the evidence; to which the defendant excepted. The State also introduced one Thompson as a witness, and asked him, 'what he knew about the lead pipes.' He testified, that he formerly used water from the lead pipes; that, while he did so, a negro on his lot

was sick, and, in describing his sickness to him, complained of a pain and weakness in his arm; and that he (witness) was not a physician. The defendant objected to this evidence, also, on the same grounds as to the evidence of Bruce, and because the negro's statements to the witness were mere hearsay. The court overruled the objections, and admitted the evidence; to which the defendant excepted."

JNO. T. TAYLOR, with whom was E. S. DARGAN, for the defendant, made the following (with other) points:

1. The indictment fails to show an indictable offense. If all the allegations in it were true, the defendant would only be liable, in a civil action, for a breach of contract. 4 Bla. Com. 4; 1 id. 46; 3 Greenl. Ev. § 1; 1 Mass. 137; Code of Alabama, § 3065. Moreover, if an indictment would lie for a breach of the contract, this indictment fails to show a breach. The contract itself, which is set out in the indictment, simply binds the defendant to supply the city of Mobile with water from the Three-mile creek, and contains no stipulation as to the character or quality of the water. The indictment does not charge that he failed to bring water from Three-mile creek, or that he brought water from elsewhere than the Three-mile creek, or that he did not bring as good water as that creek affords, but simply that he brought "unwholesome water,"—an allegation which may consist with the entire fulfillment, on his part, of every obligation imposed on him by the contract. The averment of the indictment, that the contract bound him to furnish "good and wholesome water," is at variance with the contract itself, and amounts to nothing.

2. The indictment is framed strictly on the contract, and for a breach thereof; and the question cannot be raised under it, whether an indictment would lie against the defendant, independent of the contract, for the common-law offense of selling poisonous water. But the indictment is fatally defective, whether considered as framed for a breach of the contract, or for the common-

law offense, because it does not contain such a statement of the charge as is required by the cardinal doctrines of the criminal law. The constitution itself requires, that the offense shall be described in the indictment fully, plainly, and formally: in such language as will enable the court to determine, on an inspection of the indictment, whether the charge amounts to a violation of the criminal law, and, at the same time, inform the defendant of the nature of the offense with which he is charged, and enable him to prepare for his defense; in such language, too, as will fully identify the accusation, and prevent the defendant from being tried for an offense different from that which was investigated by the grand jury.—3 Greenl. Ev. § 10; Archb. Cr. Pl. 42, 51; 29 Ala. 28; 32 Ala. 584; 33 Ala. 397; 24 Miss. 594. The defendant was convicted for introducing water into the city through leaden pipes; yet neither he nor the court could say, from an inspection of the indictment, that this was the charge which the grand jury had investigated and preferred against him. The indictment ought to have stated how, or by what means, the water was rendered unwholesome and poisonous.—2 Missouri, 226; 1 English, 519; 3 Murph. (N. C.) 224; 21 Maine, 9; 13 Metcalf, 365; 3 Iredell, 111; Breese, 4; 6 Grattan, 675; 31 Maine, 401; 3 Blackford, 193. In the analogous cases of indictments for selling unwholesome provisions, and for attempts to poison, such an allegation is indispensable to the validity of the indictment.—11 Ala. 57; 6 Ala. 664; 19 Ala. 28, and numerous cases there cited. It should have been averred, too, either that the defendant himself poisoned the water, or that he knowingly sold unwholesome and poisonous water; otherwise he might be tried, convicted and punished, for the act of a third person, of which he was wholly ignorant and blameless.—3 Greenl. Ev. § 13; 1 Bishop's Criminal Law, §§ 80, 227; Rex v. Wheatley, 1 Leading Criminal Cases, 7.

3. The testimony of Bruce was improperly admitted. If the indictment is to be considered as preferred against the whole water-works for a nuisance, evidence of special

cases of injury was inadmissible; and if it is to be considered as an indictment for individual cases of selling unwholesome water, the evidence must be confined to the persons named in the indictment.—3 Greenl. Ev. § 22; 20 Ala. 83; 25 Ala. 40; 32 Ala. 584.

4. The testimony of Thompson ought to have been excluded for the same reasons, and because it was mere hearsay.

R. B. ARMISTEAD, with whom were R. H. SMITH, and M. A. BALDWIN, Attorney-General, *contra*.—1. The fifth count of the indictment is framed on the idea, that the defendant is a public contractor, and has failed to perform a public duty imposed on him by the terms of his contract. That the indictment shows an indictable offense, see 8 Bligh, 691; 3 Barn. & Ad. 77; 5 Bing. 91.

2. That the indictment is good and sufficient, whether founded on the defendant's contract, or considered as an indictment for a public nuisance, without an averment of the *scienter*, see 3 Hawks, 378; Wharton's Precedents, 764; 28 Vermont, 583; 6 Car. & P. 292; 3 Indiana, 193; 4 *ib.* 515; 10 N. H. 297; 1 Serg. & R. 342; 6 Porter, 372; 5 Porter, 366; 3 Archb. Pr. 607; 1 Hawk. P. C. 692; 1 Russell on Crimes, 318; Wharton's Crim. Law, 2373; 11 Humph. 217; 9 Barb. S. C. 173.

3. The indictment being for a nuisance, the testimony of Bruce and Thompson was clearly admissible. That the complaints of the negro were admissible, as a part of the *res gestæ*, see 17 Ala. 620; 6 East, 188; 2 Car. & K. 354; 1 Greenl. Ev. § 102, and cases cited.

A. J. WALKER, C. J.—[Feb. 23, 1861.]—When a party owes the public a duty, although resulting from a contract, he is indictable for a breach of that duty. The obligation to the public, imposed on the defendant by his contract, was to supply water to the city of Mobile from Three-mile creek. The contract itself stipulates nothing as to the quality of water that may be furnished, further than may be implied in the requisition, that it shall be

brought from Three-mile creek. The indictment alleges the defendant's failure and neglect to supply "good and wholesome water" to the inhabitants of Mobile, and also the sale and supply by him, to those inhabitants and the persons visiting the city, of "unwholesome and poisonous water." The former branch of this allegation is indeterminate, and comports equally with the idea, that there was not a supply of any water at all, or that there was a supply of water which was positively bad. In either alternative, there would be a failure to supply "good and wholesome water." The meaning, however, becomes certain, when reference is had to the latter branch of the allegation, which shows that there was a supply of water; and the consistency of the two is preserved, by considering the former as asserting that the water supplied was not good and wholesome. There is, then, no allegation of a failure to supply water. The *gravamen* is, that there was a supply of water, the quality of which was unwholesome and poisonous. The defendant may have supplied water from Three-mile creek, which was, in the language of the indictment, "unwholesome and poisonous," because the water of the creek was unwholesome and poisonous; and he may, therefore, have perpetrated the grievance alleged in the indictment, in the exact fulfillment of his contract. The indictment, therefore, shows no violation of any duty imposed on the defendant by the terms of his contract; and we may dismiss from our consideration the arguments which refer his criminality to a breach of his contract.

[2.] The indictment charges, however, that the poisonous water was supplied to all the citizens of Mobile, and to those who might visit the city. Such an act is sufficiently general and extensive in its effects to constitute a nuisance; and the poisoning of the water consumed by an entire community, and by all who might go that way, would certainly possess the quality of injuriousness to the community, requisite to constitute a nuisance.—1 Bishop's Criminal Law, 852; 2 *ib.* 848. If, then, the indictment shows that the defendant is criminally guilty

of inflicting the public injury alleged, it is a good accusation of nuisance. The indictment does not charge that the defendant knowingly or intentionally supplied water of unwholesome or poisonous quality; nor that he poisoned the water, or imparted to it its unwholesome quality; nor that the same was done by his agents or servants. The defendant may, therefore, have done all that is alleged, and yet have been guilty of no known or intentional wrong. Can it be that, upon such facts, the defendant is criminally guilty?

The theory of the law is, that a criminal intent is a necessary ingredient of every indictable offense. The maxim is, *Actio non facit reum, nisi mens sit rea*. It is not necessary, in all cases, either to aver or prove the guilty intent; and the influence of legal presumptions may, sometimes, be such, that the legal imputation of a guilty intent may be made in contravention of the fact; as for instance, the presumption that every one knows the law. Where the *gist* of the offense is neglect, or carelessness, it would, as a general rule, be a solecism to speak of a guilty knowledge, since the neglect itself usually evidences the guilty mind; and the principle has been carried, in some cases, to the extent of making one criminally responsible for not using proper precaution to prevent the injurious acts of his servant. On this principle rest the decisions, where the servant rendered bread unwholesome, by the improper use of the ingredients; where the superintendent of a gas company corrupted the water of the river Thames, by conveying into it deleterious gases and fluids; where the engineer of a railroad neglected to ring the bell, or blow the whistle, at the crossing of a street; where the owner of a river caused detriment to neighboring lands by neglecting to scour it; where a corporation neglected to repair sea walls, in violation of its charter; and where other neglects, of like character, have been committed.—*Vermont v. Central Railroad*, 28 Vermont, 583; *Rex v. Medley*, 6 Car. & P. 292; *Henley v. Mayor of Lime*, 5 Bing. 91; S. C., 5 B. & Ad. 77; S. C., 8 Bligh's New R. 690; 1 Bishop on Criminal Law, 280, 281;

Wharton's Amer. Criminal Law, 10, 11. But this principle does not apply here, because the charge against the defendant is really an act committed, and not the omission or negligent performance of an act. Neglecting to supply good and wholesome water, and supplying unwholesome and poisonous water, cannot be tortured into a simple charge of neglect. As well might it be said, that he who administers poison, dissolved in water, is simply guilty of neglecting to administer pure water; or that he who sells poisoned bread, is simply guilty of neglecting to sell wholesome bread. Such sophistry would convert every positive act into a neglect. The poisonous quality of the water certainly may have been the result of some negligence, or carelessness, in the choice or arrangement of the instruments employed in supplying it; but such is not the charge, and we cannot aid the indictment by an inference of it.

It is a received principle, also, that "where the statement of the act itself includes a knowledge of the illegality of the act, no averment of knowledge or bad intent is necessary."—Wharton's Amer. Crim. Law, 297; Commonwealth v. Stout, 7 B. Monroe, 247; Commonwealth v. Elwell, 2 Metcalf, 190. "The law presumes that every person intends to do that which he does."—1 Bishop on Criminal Law, § 248. Hence, whenever one does an act legally wrong in itself, the law presumes the intent to do that act: the act, of itself, evidences the illegal intent. The doing of an act in its nature illegal—illegal without any extrinsic qualification—of itself evidences the criminal intent. But such is not the character of the act charged here. The furnishing of poisoned water is not, of itself, a crime: the criminality of the act depends upon the question, whether it was furnished with a knowledge of the poisonous quality; knowledge is an ingredient of the offense, and must be averred.—Wharton's Am. Crim. Law, 297; State v. Brown, 2 Speers, 129. Accordingly, where one is indicted for selling an obscene book, or for carrying off a slave, or for an indecent exposure of the person, or for keeping and suffering to go at large a dog

of ferocious and furious nature, or for bringing into a public place an animal or person infected with a communicable disease, or for selling unwholesome meat, or for selling a diseased cow, or for uttering a forged note, or for any offense of like character,—it is held, that an averment of knowledge is necessary.—1 Bennett & Heard's Leading Criminal Cases, 6, 551; Wharton's Am. Crim. Law, 2896; Wharton's Precedents of Indictments, 716, 688, 718, 759, 762, 763, 768; 3 Archbold's Crim. Pl. 609-44; 3 Chitty's Crim. Law, 648; Duncan v. State, 7 Hum. 159; Brig William Gray, 1 Paine, 16; Commonwealth v. Stout, 7 B. Monroe, 247; Rex v. Watts, 2 Esp. 675.

There are, also, other rules pertaining to the necessity of averring a *scienter*, which it is not necessary for us to consider; such, for instance, as that every person is presumed to intend the natural and probable consequences of his acts.—1 Bishop on Criminal Law, 248. From the proposition, that the criminality of supplying poisonous water consists in the fact of its being done with knowledge of the poisonous quality, it is an unavoidable sequence, that knowledge is an ingredient of the offense, and its averment is indispensable to the sufficiency of the indictment.

[3-4.] There was no error in the admission of the testimony of witnesses Bruce and Thompson. Their testimony had an obvious relevancy to the question, whether the defendant furnished unwholesome water to the public in the city of Mobile. The declarations of the slave, as to the nature of his suffering, were admissible, upon the principle settled in numerous cases decided by this court.—Holloway v. Cotton, 33 Ala. 529; Cunningham v. Kelly, 36 Ala. 78.

We do not deem it necessary to notice any of the other questions presented in the case.

Judgment reversed, and cause remanded.

OLIVER vs. THE STATE.

[INDICTMENT FOR OBTAINING MONEY BY FALSE PRETENSES.]

1. *Joinder of counts.*—In an indictment for obtaining money by false pretenses, if the false pretense is charged, in different counts, to have been made to "C. B. S. and C. L. S., who were at the time members of a mercantile firm of the name and style of S. & S.," to "C. B. S.," and to "C. B. S. and C. L. S.," there is no misjoinder of counts.
2. *Sufficiency of indictment in averring value of property.*—An averment in such indictment, that, by means of the false pretense charged, the defendant obtained "sixty-five dollars in money," is sufficiently definite and certain, without an additional averment of the value of the money.
3. *Substance of proof in description of written instrument.*—An instrument of writing, purporting in its commencement to be an indenture between two parties, reciting that the party of the first part, for a valuable consideration, "has sold, and binds himself to deliver, to the said party of the second part, all of his present crop of cotton now planted, or so much of it as will satisfy his indebtedness to the said party of the second part;" that "this conveyance is intended as a security for the payment" of a debt due from the party of the first part to the party of the second part, "which payment, if duly made, will render this conveyance void, and, if default be made in the payment of the above sum, then the said party of the second part, and his assigns, are hereby authorized to sell his certain crop of cotton, or as much of it as will pay all of his dues to the said party of the second part;" and signed and sealed by the party of the first part,—is sufficiently described in an indictment as a "deed of trust," and is admissible in evidence under that description.

FROM the Circuit Court of Pickens.

Tried before the Hon. A. A. COLEMAN.

The indictment in this case was in these words:

"The grand jurors of said county charge, that, before the finding of this indictment, James Oliver did falsely pretend to Cornelius B. Sanders and Charles L. Stone, who were at the time members of a mercantile firm of the name and style of Sanders & Stone, with intent to defraud, that he had satisfied a certain deed of trust,

which William P. Richardson had or held upon the said James Oliver's cotton crop; and that he, the said William Pinckney Richardson, had directed and given authority to him, the said James Oliver, to receive from the said Sanders & Stone the proceeds of said cotton crop, which was then in their hands; and, by means of such false pretense, obtained from the said Sanders & Stone the sum of sixty-five dollars in money; against the peace and dignity," &c.

"The grand jurors of said county further charge, that, before the finding of this indictment, the said James Oliver did falsely pretend to Cornelius B. Sanders, with intent to defraud, that he, the said James Oliver, had satisfied a certain deed of trust, which he, the said James Oliver, had made to one W. P. Richardson on the 15th day of May, 1857, upon the crop of cotton which he, the said James Oliver, had planted at the time said deed was made; and that he, the said Oliver, was authorized by the said W. P. Richardson to receive from him, the said Cornelius B. Sanders, the proceeds of the sale of the said cotton crop, which was, at the time of said false pretense, in the hands of the said Cornelius B. Sanders; and, by means of such false pretense, obtained from the said Cornelius B. Sanders the sum of sixty-five dollars in money, being part of the proceeds of the said cotton crop so in the hands of the said Sanders; against the peace and dignity," &c.

"The grand jurors of said county further charge, that, before the finding of this indictment, the said James Oliver did falsely pretend to Cornelius B. Sanders and Charles L. Stone, with intent to defraud, that he had satisfied a certain deed of trust, made by him, on the 15th day of May, 1857, to one W. P. Richardson, upon the crop of cotton which he, the said James Oliver, had planted at the time said deed was made, and that he, the said James Oliver, was authorized by the said W. P. Richardson to receive from them, the said Cornelius B. Sanders and Charles L. Stone, certain proceeds of the sale of said cotton crop, which they had in their hands;

and, by means of such false pretense, obtained from the said Cornelius B. Sanders and Charles L. Stone the sum of sixty-five dollars in money; against the peace and dignity," &c.

The defendant demurred to the indictment—"1st, because the money is not charged to be the property of any person; 2d, because there is no value charged as to the money; 3d, because it is uncertain whether the defendant is charged with a felony or not; 4th, because there is a double issue presented in each count; 5th, because there is a special pretense without a special breach; 6th, because there is a misjoinder of counts and offenses; and, 7th, because the indictment is uncertain and obscure." The court overruled the demurrer, but the record does not show that the defendant reserved an exception to its decision.

"On the trial," as the bill of exceptions states, "the State offered in evidence an instrument of writing, which had been duly proved and recorded according to law, and of which the following is a copy: 'This indenture, made the 15th day of May, 1857, between James Oliver, of the first part, and W. P. Richardson, of the second part, (all of the State of Alabama, and county of Pickens,) witnesseth, that the said party of the first part, for and in consideration of the sum of one hundred and seventy-eight 25-100 dollars, to him duly paid in hand, has sold, and binds himself to deliver, to the said party of the second part, all of his present crop of cotton now planted, or so much of it as will satisfy his indebtedness to the said party of the second part. This conveyance is intended as a security for the payment of one hundred and seventy-eight 25-100 dollars, on the 25th day of December, 1857; which payment, if duly made, will render this conveyance void; and if default be made in the payment of the above sum, then the said party of the second part, and his assigns, are hereby authorized to sell his certain crop of cotton, or so much of it as will pay all of his dues to the said party of the second part, with costs and expenses allowed by law. In witness whereof, I have here-

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unto set my hand and seal.' (Signed) 'James Oliver.' [Seal.] The defendant objected to the introduction of said paper as evidence to the jury, but the court overruled his objection; and he excepted."

W. R. SMITH, for the prisoner.—1. The indictment is defective, in the several particulars which were assigned as grounds of demurrer. It charges a special pretense, but assigns no breach of that pretense. It does not charge the ownership of the money; and *non constat* but that it was the property of the defendant himself. It does not charge the value of the money, and, therefore, leaves it uncertain whether any offense was committed. It charges the false pretense to have been made to different persons, and the money to have been obtained from different persons; and presents as plain a case of misjoinder, as if it alleged; in different counts, a larceny from A and a larceny from B, or an assault and battery on A and an assault and battery on B.

2. The term "deed of trust," as used in the indictment, must be construed in its legal sense. In a technical deed of trust there must be a trustee. The paper read in evidence, conveyed no legal title to any one, and only gave Richardson power to sell *his own* cotton. The crop planted was a mere expectancy, and could not become Richardson's until actually delivered.

M. A. BALDWIN, Attorney-General, *contra*, cited Johnson v. The State, 29 Ala. 62; O'Connor v. The State, 30 Ala. 9; People v. Stetson, 4 Barbour, 151.

STONE, J.—[March 1, 1861.]—The indictment in this case contains three counts, each of which is a substantial compliance with the form furnished in the Code,—form No. 35, page 702. The only difference in the three counts consists in the designation of the person to whom the false pretense was made. The varying averments in the several counts, in this regard, were evidently inserted to meet every possible phase of the proof, as the same

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might arise. The averment of *the person* to whom the false pretense was made, was part and parcel of *the means* by which the offense was committed. The counts are severally good.—Lowenthall v. The State, 32 Ala. 589.

We have frequently held, that two or more counts might be joined in the same indictment, each of which charged a distinct felony, if the offenses were of the same character, and subject to the same punishment.—Johnson v. The State, 29 Ala. 62; Cawley v. The State, at the present term. The demurrer for misjoinder was properly overruled.—Scott v. The State, at the present term.

[2.] Money is, itself, a measure of value; and that value cannot be rendered more definite by an averment of its value. The phrase "sixty-five dollars in money," has a defined meaning, which is not rendered more clear by the superadded expression, *worth sixty-five dollars*.

[3.] The instrument read in evidence was sufficiently described as "a deed of trust."—Price v. Masterson, 35 Ala. 393.

The judgment of the circuit court is affirmed.

MERKLE vs. THE STATE.

[INDICTMENT FOR SELLING LIQUOR TO STUDENT OF COLLEGE.]

1. *Opinion of witness, admissibility of.*—A witness who has frequently drunk fermented liquors, and who can distinguish them by their taste, though he has no special knowledge of chemistry, is competent to express an opinion on the question, whether lager beer is or is not a fermented liquor.
2. *Books of science, admissibility of.*—Extracts from standard medical books are competent evidence, and may be read to the jury.
3. *What constitutes offense of selling liquor to student or minor.*—The statute prohibiting the sale or delivery of liquor to students or

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minors, (Code, §§ 3280-81,) applies to fermented liquors as well as to vinous or spirituous liquors.

FROM the Circuit Court of Perry.
Tried before the Hon. PORTER KING.

IN this case, Luther Merkle and William H. Redding were jointly indicted for selling liquor to a student of Howard college, in the town of Marion, and were jointly tried. On the trial, as the bill of exceptions shows, the State first introduced as a witness one Pollard, the student to whom the liquor was sold, and who testified to the fact that, within the period covered by the indictment, he bought a glass of lager beer from the defendant Merkle, who was acting as clerk or agent for his co-defendant, in a confectionary store belonging to the latter. The State then introduced one Thornton as a witness, who testified, "that he was professor of chemistry in Howard college; that the fermentation of organic bodies is one of the subjects treated of in chemistry; that he had studied that subject in the different books on chemistry, and was theoretically acquainted with it, but had no practical knowledge of the process of fermentation, or the art of brewing; that he had drunk lager beer at various places, and in the store of the defendant Redding; and that he was acquainted with the taste of fermented liquors, from having frequently drunk liquors which were fermented." On this state of facts, the court allowed the witness, against the objection of the defendant Merkle, to state that, "in his opinion, lager beer is a fermented liquor;" to which said Merkle excepted. Said witness afterwards testified, on cross-examination, "that he knew nothing of the fermentation of liquors, except what he had read in books on the subject; that he was not a brewer, and knew nothing whatever, practically, of the fermentation of liquors; that all he knew on the subject was theoretical, and derived from books; that in speaking on the subject, he had only given, and could only give, the contents thereof, so far as he knew the same; that the books them-

selves, if in court, would be better evidence than his testimony, because he could not use such language as was used in them, and could not recollect all that was therein stated on the subject; that his knowledge of chemistry did not aid him in reference to knowledge acquired by tasting said beer; and that one not acquainted with chemistry could judge of said beer, by the taste, as well as he." On these facts, the defendant Merkle moved the court to exclude from the jury the opinion of the witness above stated, and reserved an exception to the overruling of his objection. The State afterwards read in evidence to the jury an extract from the "*United States Dispensatory*," by Wood & Burke, on the subject of vinous and fermented liquors; having first proved, by the testimony of a practicing physician, "that said book was recognized by the medical profession as good authority on all subjects therein treated of;" and to the admission of this extract as evidence the defendant Merkle excepted. The court charged the jury, among other things, "that, if they believed the beer sold to said Pollard was a fermented liquor, it would be their duty to find said Merkle guilty, whether said beer would intoxicate or not;" to which charge said Merkle reserved an exception.

BROOKS & GARROTT, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—[Jan. 22, 1861.]—It may be admitted, that the bill of exceptions excludes the idea, that the witness Thornton was at all aided by his knowledge of chemistry, in the formation of his opinion that lager beer is a fermented liquor. It is shown, however, that he had frequently drunk fermented liquors, and that he was able to distinguish, by their taste, liquors which have undergone the process of fermentation. We hold, that such a witness, even though he may have no special knowledge of the science of chemistry, may be permitted to testify, that a particular liquor, which he has tasted, is, or is not, fermented. The answer to the question, whether

a liquor has gone through the process of fermentation, does not necessarily demand a knowledge of chemical science, but is usually determinable by the senses; and consequently, the judgment of ordinary persons, having an opportunity of personal observation, and of forming a correct opinion, is admissible.—*McCreary v. Turk*, 29 Ala. 245; *Wilkinson v. Mosely*, 30 Ala. 572; *Ward v. Reynolds*, 32 Ala. 384; *Pullman v. Corning*, 14 Barb. 174, 181.

[2.] The book, a portion of which was read in evidence, was shown to be a standard medical work; and under the rule adopted in *Stoudenmeier v. Williamson*, (29 Ala. 558,) the objection to the extract as evidence, was properly overruled.

[3.] Under sections 3280 and 3281 of the Code, it is not necessary to the conviction of the defendant, that the liquor sold, delivered or given to a student or minor, should be intoxicating. The prohibitions of these sections extend to any fermented liquor which is commonly used as a beverage. There was, therefore, no error in the charge of the court.

Judgment affirmed.

MURPHY vs. THE STATE.

[INDICTMENT FOR MURDER.]

1. *Challenge of jurors.*—In all trials for capital or penitentiary offenses, (Code, § 3585,) the State may, at its election, challenge for cause a juror who has a fixed opinion against capital or penitentiary punishments; yet the statute does not impose on the court the duty, *ex mero motu*, of setting aside a juror for this cause; nor can the prisoner complain if the State waives or forbears to exercise its right of challenge.
2. *General objection to evidence.*—A general objection to evidence, a part of which is legal, may be overruled entirely.

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3. *Homicide; presumption of malice.*—The charge of the court to the jury in this case, as to the presumption of malice in cases of homicide, construed in connection with the fact, indisputably established, that the killing was perpetrated with a deadly weapon, held to contain no error prejudicial to the prisoner.

FROM the Circuit Court of Montgomery.

Tried before the Hon. JAMES B. MARTIN.

THE prisoner in this case, Patrick Murphy, was indicted for the murder of Hugh Keys, and pleaded not guilty to the indictment. "On the trial," as the bill of exceptions states, "the court asked a juror, regularly summoned, whether he had a fixed opinion against capital or penitentiary punishment. The attorney-general thereupon said, that he would waive the challenge for cause on behalf of the State. The prisoner insisted, by his counsel, that the juror was incompetent for cause, and that the State could not render him competent by waiving the objection. The court held otherwise, and put the juror upon the prisoner, who, to avoid his being placed on the jury, was compelled to challenge him peremptorily, and thereby lessen, to that extent, his number of peremptory challenges; to which ruling of the court the prisoner excepted."

"To prove the circumstances of the killing, the State introduced and examined as a witness one Mrs. Keys, the widow of the deceased. On cross-examination of said witness, the prisoner's counsel asked her, whether she did not swear, on the preliminary examination of the prisoner before Squire Nettles, on the 23d December, 1859, for the offense for which he was now being tried, that 'he, (meaning the prisoner,) always told Mr. Keys to come on;' and read said expression to her from her sworn deposition, taken down in writing on said preliminary examination. The witness stated, that she had not so sworn on said preliminary examination. Thereupon the prisoner's counsel produced and proved the written deposition of said witness, as taken down on said preliminary examination, and read from it these words, 'He always

told Mr. Keys to come on;' and proved that said witness swore to said expression on said preliminary examination. The counsel for the State then offered to read the whole deposition of said witness, as written down on said preliminary examination; not as original evidence in the cause, but to explain the testimony of said witness, and to show that there was no conflict between her testimony then and now. The prisoner objected to this evidence, as illegal, irrelevant, and calculated to mislead the jury; but the court overruled his objections, and admitted the evidence for the purpose for which it was offered; to which the prisoner excepted."

The court, *ex mero motu*, charged the jury as follows:

"Under this indictment, if the evidence, under the law as laid down by the court, warrant it, the prisoner may be convicted of murder in the first degree, murder in the second degree, or manslaughter in the first degree. Murder is the killing of a reasonable person, with malice aforethought, express or implied. Express malice is evidenced by threats, former grudges, lying in wait, &c.; while malice may be implied from the preparation made, the character of the weapon used, &c. Manslaughter is the wrongful taking of the life of a reasonable being, without malice; and it occurs when one takes the life of another, in sudden heat of passion, without malice. No killing can be murder, in the absence of malice; nor can a killing be manslaughter, when done with malice. It devolves upon the State, in every criminal case, to prove the facts constituting the defendant's guilt, and to satisfy the jury, beyond a reasonable doubt, of their truth. In this case, the State must prove, that the defendant, prior to the finding of the indictment, and in the county of Montgomery, killed Hugh Keys with malice aforethought. So regardful is our law of human life, that whenever it is proved that one person has taken the life of another, the law presumes that it was done with malice, and imposes upon the slayer the *onus* of rebutting this presumption, unless the evidence which proves the killing itself shows it to have been done without malice. Murder, by our law,

is divided into two degrees—murder in the first, and murder in the second degree. Every homicide, perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious and premeditated killing, is murder in the first degree. Every homicide, committed with malice aforethought, and which is not embraced in the above definition, is murder in the second degree. Manslaughter is the wrongful killing of a reasonable creature in being, without malice; and if done voluntarily, is manslaughter in the first degree.

“Examine this case, then, first in reference to murder in the first degree. Has the State proved, that, prior to the finding of this indictment, and in this county, the defendant killed Hugh Keys with a bowie-knife; and further, that he did so willfully, deliberately, maliciously, and with premeditation? Does the whole evidence in the case satisfy your minds, beyond a reasonable doubt, that these things, and each of them, are true? If so, then the defendant would be guilty of murder in the first degree. If, on the contrary, the evidence fails thus to satisfy your minds, either of the killing, or that it was done willfully, deliberately, maliciously, and with premeditation, then the defendant would not be guilty of murder in the first degree, and you must proceed to inquire, whether the evidence shows him to be guilty of murder in the second degree. It is conceded, that the defendant took the life of Keys; and if it does not amount to murder in the first degree, then, whether it is murder in the second degree, depends upon the question, whether the killing was done with malice aforethought. As the court has already informed you, when a killing has been proved, the law presumes that it was done with malice, unless the same evidence which proves the killing, disproves or rebuts the presumption of malice. Does the evidence which proves the killing, itself disprove or rebut the presumption of malice? If, however, this evidence does not repel the presumption of malice, then look to all the other evidence in the case,—both that which tends to rebut the idea of malice, if there be such evidence, and

all the evidence tending to show that the defendant was actuated by malice, if there be such evidence,—and if you find, from the entire evidence, that the killing was done by the defendant with malice aforethought, and that it does not amount to murder in the first degree, then the defendant would be guilty of murder in the second degree. But, if you find, upon a fair survey of the evidence, that the killing was done without malice, then the defendant would not be guilty of murder; and in that event, you must next inquire, whether the killing amounted to manslaughter. If the defendant, in this county, and before the finding of this indictment, wrongfully and voluntarily killed Hugh Keys with a bowie-knife, without malice, express or implied, then he would be guilty of manslaughter in the first degree.

“Homicide may be committed—human life may be taken—upon such provocation, and under such circumstances, as will acquit the slayer of all guilt; and such, the defendant says, is the homicide he has committed. He insists, that though he took the life of Keys, he did it in self-defense; that he did it to save his own life, or to save his person from great bodily harm. The law on that subject is this: Every man has the right to strike in self-defense—to repel force by force, when attacked, even to the death of the assailant; provided, that the force which he uses is not disproportioned to the force which he is repelling. In this case, if you should believe, from the evidence, that it was necessary for the defendant to strike at the time he did strike, in order to save his own life, or to prevent the infliction of imminent and great bodily harm, and that he struck for this purpose, then the defendant would not be guilty. Or, if you should believe that, at the time the defendant struck, the circumstances which surrounded him were such as would have impressed the mind of a reasonable man with the honest belief, that it was necessary to strike, to save his own life, or to prevent great and impending bodily harm; and that the defendant, actuated by these motives, struck,—then, though death was the consequence, he would be guiltless. The

law excuses the taking of human life, when the motive which prompts the act is one of self-defense and self-protection, and under circumstances inducing the reasonable belief that the act was necessary. You must determine what is the evidence on this subject. The State insists, that the defendant, entertaining the malicious intention to take the life of Keys, sought a quarrel with him, in order to find an opportunity to gratify his malice by taking his life. If, from a survey and impartial consideration of all the evidence, you believe that this is true—that the defendant sought the quarrel with the deceased, in order that he might take advantage of it to kill him, and, in obedience to this intention, did bring on the quarrel, and did take the life of the deceased—then, no provocation, no danger to himself, thus brought on, would excuse the killing. But what is the truth of this matter? Does the evidence show that the position of the State, or that the position of the defendant, is true? This you must determine, from the evidence.”

To each part of this charge the prisoner excepted.

CHILTON & YANCEY, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[May 14, 1861.]—By section 8585 of the Code it is provided, that, in all trials for a capital or penitentiary offense, it is a good challenge for cause *by the State*, that the juror has a fixed opinion against capital or penitentiary punishments. The statute makes the specified cause a ground of challenge by the State; but it cannot, without the most glaring perversion of its meaning, be understood as making it a ground of challenge by the prisoner, or as imposing upon the court the duty, *ex mero motu*, of setting aside a juror for the cause mentioned. The State may, or may not, at its election, challenge a juror for the cause mentioned; and the prisoner has no right to complain that the State forbears to exercise the right of challenge.

[2.] It is possible that some portion of the evidence of Mrs. Keys, which the court admitted against the prison-

er's objection, did not serve to explain either the expression as to which she was contradicted, or her motives; but it is certain that much of it was so connected with the particular expression, as to render the part so connected competent evidence. This being the case, the court, as we have often decided, committed no reversible error in overruling a general objection to the entire evidence. In placing our decision, however, upon this ground, we must not be understood as affirming that any portion of the evidence was illegal. Upon that subject we express no opinion.

[8.] The counsel for the prisoner, though confessedly able, have pointed out nothing objectionable in the charge of the court; and if there be any error in it, prejudicial to the prisoner, a careful examination has not enabled us to discover it. Construing the charge in reference to the fact, indisputably established, that the killing was perpetrated with a deadly weapon, we think there can be no doubt that the instruction as to the presumption of malice was correct.—York's case, 9 Metcalf, 98; 3 Green. Ev. § 14.

Judgment affirmed.

POINT vs. THE STATE.

[INDICTMENT FOR LARCENY IN DWELLING-HOUSE.]

1. *Variances in name of owner of stolen goods.*—Where the indictment alleged the stolen goods to be the property of *Juli* Antoine, while the proof showed that they belonged to a Frenchman, whose name was *Juli* Antoine in French, and who was "generally called as if his name was spelled *Jules* Antoine,"—*held*, that there was no variance or misnomer.
2. *What constitutes larceny in dwelling-house.*—Under section 3170 of the Code, unlike the penal code of 1841, (Clay's Digest, 425, § 55),

a person may be convicted of larceny in a dwelling-house, although he was in the house, at the time of the theft, by the invitation of the owner.

FROM the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THE indictment in this case charged, that the prisoner, John Point, "feloniously took and carried away from a dwelling-house a coat, of the value of ten dollars, and a pair of pantaloons, of the value of five dollars, the personal property of Juli Antoine." The evidence adduced on the trial, and the charges of the court to the jury, are thus stated in the bill of exceptions:

"The State introduced a witness, who testified as follows: 'In October, 1860, about a week before the finding of the indictment in this case, the prisoner came to him, with a cloth coat, a pair of military pantaloons, and a military coat, (the two last being identical with those of the first sergeant of the 'Guards LaFayette,' a volunteer military company in the city of Mobile, of which company witness was then the first lieutenant,) and wanted to sell them to him, and told him that they had been given to him by a Mr. Clebert, of New Orleans. Witness told him, that he did not wish to buy them; and the prisoner then appealed to him, as a favor, to advance him ten dollars on the goods, and take and sell them for him. Witness gave the prisoner the money, and took the goods to sell; but, after the prisoner left, he went to the first sergeant of said company, and brought him to his store; and said sergeant identified and claimed said goods as his own. Said sergeant's name is Juli Antoine, as spelled in the French language; he is a Frenchman by birth, and so is witness; he is generally called as if his name was spelled Julee Antoine, but is called in French Juli Antoine, as pronounced in the French language.' The State then introduced Juli Antoine as a witness, who testified, that the prisoner came to him, a short time before the finding of the indictment, said that he was a stranger in Mobile, without the means to

provide a home, and asked his hospitality; that he told the prisoner, he would give or afford him a lodging, if he would occupy the same bed with himself in the house where he lodged; that the prisoner consented to this, and slept with him that night, (which was Thursday,) and the three following nights; that the said stolen goods were in his trunk, in his said bed-room; that they were in his trunk on Sunday, and he missed them the next day; that he found them at the store of the witness Fitchell, and was positive as to their identity, and also as to the identity of the prisoner; that the cloth coat was worth about four dollars, the military coat about ten dollars, and the pantaloons about five dollars; that the military clothes were a part of his sergeant's uniform; and that he occupied and slept in said room, and had done so for several years. Another witness corroborated the above testimony.

"The court charged the jury, among other things, 'that there was no misnomer or variance in Antoine's christian name—that it could be spelled Jule as well as Juli.' The prisoner excepted to this charge, and requested the court to instruct the jury as follows: 'If the jury believe that the prisoner, by the permission of Juli Antoine, occupied the same room for three days, and, at the time said occupancy commenced, had formed no intention to commit any offense, and that the goods were stolen by him during such occupancy—then he would not be guilty as charged in the indictment, but would be guilty of petit larceny.' The court refused to give this charge, and the prisoner excepted."

STONE, J.—[March 2, 1861.]—We are not able to perceive any misnomer in the present case. The pronunciation of the two names is substantially the same, and we think the doctrine of *idem sonans* must be held to apply. —Petrie v. Woodworth, 3 Caines' Rep. 219; Aaron v. The State, at the present term; Whar. Am. Cr. Law, § 258, and authorities cited.

[2.] The question, whether or not the alleged larceny

was committed in a dwelling-house, is not presented by the present record. We are not informed that the bill of exceptions contains all the evidence; and that which is set out, tends to prove, that the present building was applied to some of the uses to which dwelling-houses are applied. Whether a room, occupied only as a sleeping apartment, is a "dwelling-house," within section 3170 of the Code, we need not inquire, as that question is not presented by the record before us.

Section 3170 of the Code is a clear departure from our old statute, which was construed in *Chambers' case*, 6 Ala. 855. Its language is, "any person, who commits larceny in any dwelling-house, store-house," &c.—Code, § 3170. Under this statute, it is manifest that a person, who is in a dwelling-house by invitation, may therein commit the offense which it was designed to punish. The provisions of this section are very much like those of 12 Anne, (2 East's Cr. Law, 644,) under which it was ruled, that "the property stolen must be such as is usually under the protection of the house." This clearly indicates what the legislature deemed the aggravating feature of the statute. It is not the fact that a dwelling-house is broken or entered, which constitutes the statutory crime. The sanctity which the place throws over property which is under its protection, magnifies the offense, and constitutes it a felony, irrespective of the value of the property stolen.—2 East's Cr. Law, 644-5; *Rex v. Taylor*, 1 Russ. & Ry. 417.

The charge asked was properly refused, and the judgment of the city court is affirmed.

THOMPSON *vs.* THE STATE.

[INDICTMENT FOR RETAILING SPIRITUOUS LIQUORS.]

1. *Removal of licensed retailer from county; liability of agent.*—The mere removal of a licensed retailer to another county, neither abrogates his license, nor renders his clerk or agent, who continues to carry on his business, subject to an indictment under the statute.

FROM the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THE indictment in this case was in the form prescribed by section 1059 of the Code. On the trial, as appears from the bill of exceptions, the State proved, that the defendant sold spirituous liquors, at the bar of the City Hotel in Mobile, within the time covered by the indictment. The defendant then proved, that the bar belonged to one Steadman, who had removed from Mobile to Claiborne; that he acted simply as the agent of Steadman, under a written power of attorney, and carried on the business in Steadman's name; and that Steadman, at the time of his removal from the county, and while the defendant sold liquors at his bar, had a regular license from the probate judge of Mobile. The license and the power of attorney were both produced and proved. On these facts, the court charged the jury, "that a man could not, by means of a clerk or agent, carry on a bar in one county, while he lived in another county; that the privilege of retailing was a personal trust; that the party licensed to retail, must reside at the place of his business, and give his personal supervision over his bar, although an occasional absence was allowable; and that if they believed the defendant sold spirituous liquors in Mobile, and that Steadman resided in another county, they must

find the defendant guilty." To this the defendant excepted.

WILLIAM BOYLES, and J. H. SMOOT, for the defendant.
M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—[March 2, 1861.]—The charge of the court asserts the proposition, that a licensed retailer must reside at his place of business, and give his personal supervision over his bar; and that if, after obtaining the license, he removes to, and resides in another county, his license is thereby so far annulled, that it affords no protection to the clerk or agent employed by him to conduct the business after his removal. We do not think that this is the law. Whether a license to retail can be properly granted to one who does not, at the time it is issued, reside in the county to which the license refers, is a question not now presented, and we express no opinion in regard to it. But, where such license has been issued, to one who is at the time a resident of the county, we do not think it can be asserted, as matter of law, that the mere removal of the party to another county, abrogates the license, or destroys the right which he had before his removal, to exercise the privilege conferred by the license, by his clerk or agent. See *Long v. State*, 27 Ala. 86.

Judgment reversed, and cause remanded.

CAWLEY vs. THE STATE.

[INDICTMENT FOR LARCENY.]

1. *Regularity of proceedings presumed, against irregularities of minute-entries in transcript.*—The appellate court will not presume that the prisoner was tried and sentenced without an indictment, simply,

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because the several minute-entries, showing the trial, conviction and sentence, are copied into the transcript before the indictment.

2. *Joinder of offenses in indictment.*—Two offenses, of the same general nature, and belonging to the same family of crimes, may be charged, in different counts, in the same indictment, where the mode of trial and the nature of the punishment are the same.
3. *Sufficiency of verdict.*—A general verdict of guilty, under an indictment charging two offenses, properly joined in different counts, is sufficient to authorize a judgment and sentence for the punishment prescribed for one of the offenses.

FROM the Circuit Court of Dallas.

Tried before the Hon. PORTER KING.

THE indictment in this case contained two counts; the first charging the prisoner with larceny from "a dwelling-house;" and the second, with larceny from "a shop." The jury returned a general verdict of guilty, and the court thereupon sentenced the prisoner to confinement in the penitentiary for three years. Before sentence was pronounced, the prisoner moved in arrest of judgment, "on the ground that there is a general verdict on two counts for separate and distinct offenses." The court overruled the motion, and the prisoner excepted. The several minute-entries, showing the trial, verdict, and judgment, are copied into the transcript before the indictment.

GEO. W. GAYLE, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[March 1, 1861.]—The first point made in this case is, that, as the sentence is copied into the transcript before the indictment, it must be inferred, that the sentence of the court preceded the finding of the indictment; and that, therefore, the accused was tried and sentenced without an indictment. We cannot sustain this point.

[2-3.] It is objected, that a general verdict of guilty is not sufficient, where distinct offenses, as those of lar-

ceny from a dwelling-house and larceny from a shop, are alleged in different counts. After an elaborate and careful review of the authorities, we feel safe in announcing the conclusion, that "two offenses, committed by the same person, may be included in the same indictment, where they are of the same general nature, and belong to the same family of crimes, and where the mode of trial and nature of punishment are also the same;" and also, that a general verdict of guilty, where such offenses are joined, is no ground for an arrest of judgment, or of error, where the sentence pronounced does not impose a greater punishment than that prescribed for one offense. Our conclusion is fully sustained by the authorities cited below.—Johnson v. State, 29 Ala. 62; 1 Arch. Crim. Pl. 95 and notes; Whar. Am. Cr. Law, 422; U. S. v. Peterson, 1 W. & M. 305; State v. Haney, 2 N. C. Rep. 390; 1 Arch. Cr. Law, 175-6; Booth v. Commonwealth, 5 Met. 535; Carlton v. Com., *ib.* 532; Kane v. People, 8 Wend. 203; State v. Hooker, 17 Ver. 653; State v. Coleman, 5 Por. 32; State v. Mose, 35 Ala. 421.

Judgment affirmed.

HARRISON vs. THE STATE.

[INDICTMENT FOR DISTURBANCE OF PUBLIC WORSHIP.]

1. *What constitutes offense.*—To constitute the statutory offense of disturbing religious worship, (Code, § 3257,) the act must be willfully or intentionally done; it is not sufficient that it was done recklessly or carelessly.
2. *Evidence of character.*—Under an indictment for disturbing religious worship, the defendant has a right to adduce evidence of his good character; but, until he has done so, the prosecution cannot prove his bad character as a disturber of public worship.
3. *Evidence of other acts of disturbance.*—Evidence of the fact that similar acts of disturbance had been perpetrated by other persons

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in the same church, without objection or notice on the part of the members of the congregation, is irrelevant and inadmissible.

FROM the Circuit Court of Lowndes.

Tried before the Hon. JOHN K. HENRY.

THE indictment in this case alleged, that the defendant "willfully interrupted or disturbed an assemblage of people met for religious worship, by noise, profane discourse, rude and indecent behaviour, or by fighting, at or near the place of worship." On the trial, as appears from the bill of exceptions, the State proved the fact, that the congregation of a church in Lowndes county, which had assembled for religious worship, on a particular Sunday night, within the time covered by the indictment, had been disturbed by the loud and repeated slamming of the door by some person who was outside; and adduced some evidence tending to show that the defendant was the person who made the noise. "The State then put up one Davids as a witness, who testified, that he was not at the church on the night in question. The defendant's counsel asked said witness, without objection, if he had not often seen the defendant in said church, and if, on those occasions, the defendant had not conducted himself in an orderly and quiet manner; and the witness answered in the affirmative. The State then offered to prove by said witness, what the defendant's general character was in that respect. The defendant objected to this question; the court overruled the objection, and permitted the witness to be examined in this respect; and the defendant excepted. The witness answered, that he did not know the defendant's general character."

"The defendant proposed to prove by two of his witnesses, that they had often opened the door of said church, looked in, and then shut the door, without any objection being made by any body;" also, "that it had been customary for many years, for persons to go to the door of said church during religious services, open it and

look it, without going in, and then shut it; and that the members of the congregation of said church made no objection to this conduct on the part of the witnesses." The court excluded this evidence, and the defendant excepted.

The defendant also reserved an exception to the charge of the court, which is copied in the opinion, and, therefore, does not need to be here repeated.

BAINES & NESMITH, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—[Feb. 16, 1861.]—The defendant was indicted under section 3257 of the Code, which declares, that "any person, who willfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse," &c., is guilty of a misdemeanor. The court charged the jury, "that, if the defendant disturbed the congregation, when met for, or engaged in religious worship, either willfully or recklessly," then the case would be within the provisions of the statute.

The word *willful*, when employed in penal enactments, has not always the same meaning. In this statute, it is used as the synonym of *intentional*, or *designed*—*pursuant to intention or design, without lawful excuse*.—1 Bish. Cr. Law, § 262; *State v. Abram*, 10 Ala. 928; also, *McManus v. The State*, 36 Ala. 285. The word *reckless* means "heedless, careless, rash, indifferent to consequences." Now, one may be heedless, rash, or indifferent to results, without contemplating or *intending* those consequences. As a general rule, there is a wide difference between intentional acts, and those results which are the consequence of carelessness.

While the question of *the intention* with which the act of disturbance was done, was one of inference or presumption from all the circumstances, to be drawn by the jury, we do not think the statute was violated, if the disturbance was the consequence of an act which was simply reckless, or careless. To be guilty, the defendant must

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have gone farther, and intentionally created the noise. If he intentionally did an act, or employed language, so near to the place where he knew a worshipping assembly was congregated, as that he must have known that such worshipping assembly would be disturbed by such act or language, then such act would be, in the eyes of the law, a willful disturbance, unless some lawful excuse existed therefor. A worshipper in a church, discovering a building on fire, would doubtless be justified in giving the alarm, although in doing so he might disturb the assembly. Whether the noise disturbed the assembly, and, if so, whether the conduct of the defendant was such as to show that he intended to make that noise, were questions for the jury, under appropriate instructions from the court.—See *Ogletree v. The State*, 28 Ala. 693.

[2.] The defendant had the right to put in evidence his good character; but, until he did so, the prosecution was not authorized to prove his bad character as a disturber of religious assemblies.—3 Greenl. Ev. § 25.

[3.] Evidence that similar acts of disturbance had been perpetrated by others in that church, and had not been noticed, was irrelevant.

Reversed and remanded.

HUTTENSTEIN vs. THE STATE.

[INDICTMENT FOR KEEPING RESTAURAT WITHOUT LICENSE.]

1. *Sufficiency of indictment.*—In an indictment for keeping a restaurat without license, (Code, §§ 397, 399,) it is not necessary to allege that the defendant *was engaged in the business of keeping a restaurat*; it is sufficient to allege that he “*did keep a restaurat*” without license.

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FROM the City Court of Mobile.

Tried before the Hon. HENRY CHAMBERLAIN.

THE indictment in this case charged, that the defendant "did keep a restaurant, or eating-house, without a license, and contrary to law." The defendant moved to quash the indictment, and also demurred to it, on the ground that it did not sufficiently describe the offense. The court refused to quash, and overruled the demurrer; and the defendant reserved exceptions to its decisions.

CHANDLER & MCKINSTRY, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[March 1, 1861.]—Section 399 of the Code is more comprehensive than the statutes under which the indictments in the cases of Pettibone v. State, (19 Ala. 586,) Eubanks v. State, (17 Ala. 181,) and Moore v. State, (16 Ala. 411,) were framed. The section of the Code referred to is not confined to the engaging in a business or employment, but extends to the doing of any act, without first obtaining a license, for which a license is required by the article in which the section is found. We think the motion to quash, and the demurrer in this case, were properly overruled.

Judgment affirmed.

WARD vs. THE STATE.

[INDICTMENT FOR GAMING WITH SLAVE.]

1. *What constitutes offense; general charge on evidence.*—To constitute the offense of playing cards with a slave or free negro, (Code, § 3256,) a game must be entered upon, and some act done towards its completion, though it is not necessary that the game should be

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played out; and where the only evidence before the jury is, that the parties were seen seated on opposite sides of a box, each with four or five cards in his hands, while the rest of the pack lay within their reach, with the top card turned face upwards, and that they immediately bunched the cards, on seeing the witness, and said that the slave was telling the defendant's fortune,—a charge to the jury, instructing them that, "if they believed the evidence, they must find the defendant guilty," is an invasion of their province.

FROM the Circuit Court of Dale.

Tried before the Hon. JOHN GILL SHORTER.

THE indictment in this case charged, "that Redding Ward, a white person, did play at cards with a slave named Cain, the property of Dempsey Dowling." "On the trial," as the bill of exceptions states, "the State introduced a witness, who testified, in substance, that, within twelve months next before the finding of the indictment in this case, he went to a mill in said county, belonging to Mr. Dempsey Dowling, and there found the defendant and a slave, named Cain, who belonged to said Dowling; that they were seated at a box, the defendant on one side, and the slave on the opposite side; that the box had a handkerchief spread over it; that he saw four, five, or more cards in the slave's hands, and about the same number in the defendant's hands, while the balance of the pack was lying within reach of them, with a face-card on top, which had the face turned upwards; that he saw no money, or anything else, at stake; that the defendant and the slave, as soon as they saw him, bunched all the cards together, and the defendant remarked, 'that the slave was telling his fortune;' that after the cards were so bunched, or thrown together, the defendant told the slave to mark one of the cards on the back, and he could tell it by its face; that the slave marked one of them with his thumb-nail, (the defendant not seeing which one he marked,) and, after shuffling them, handed the cards to the defendant; and that the slave then told the defendant to mark and shuffle the cards for him in like manner. The witness further stated,

that this sort of playing, or use of the cards, was all that he saw done by the defendant and the slave, except as above stated; and that the slave professed to be a fortune-teller, and was so reputed in the neighborhood. This being all the evidence, the court charged the jury, 'that, if they believed the evidence, they must find the defendant guilty, and assess a fine against him of not less than fifty dollars;' to which charge the defendant excepted."

PUGH & BULLOCK, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—[Feb. 15, 1861.]—The defendant was indicted under section 3256 of the Code, which is in the following language: "Any white person, who plays at cards with any slave or free negro, must, on conviction, be fined," &c. We think that, to come within this section, a game must be entered upon, and some act done towards its completion. Amusing one's self with cards, as with toys, will not make out the offense. It is not necessary, however, that the game shall be completely played out. If the game be in part entered upon, the statute is violated. *Coggins v. The State*, 7 Porter, 264; *Holland v. The State*, 3 Por. 292; *Cochran v. The State*, 30 Ala. 542; *Webster's Dictionary*, "To play."

The testimony recited in the bill of exceptions, shows that the defendant and the slave were seated on opposite sides of a box, each holding in his hand four, five, or more cards,—while beside them lay the pack, with the top card face-upwards. On seeing the witness, the defendant and the slave bunched the cards, and some expressions were indulged as to fortune-telling. This was all the evidence tending to prove the defendant's guilt. We concede, that these circumstances may have been strong, and from them the jury may have inferred that the parties had seated themselves to play at cards, and had so far entered upon the game as to deal out hands and turn up a trump; yet, in order to establish the de-

fendant's guilt, it was necessary that the jury should find a further fact or facts than were positively sworn to by the witness. Such further fact or facts, the law, unassisted by a jury, could not infer. We think the court, in its charge, invaded the province of the jury.—*Ogletree v. The State*, 28 Ala. 700; *Scitz v. The State*, 23 Ala. 42; *Morgan v. The State*, 33 Ala. 413; 1 Bish Cr. Law, § 251.
Reversed and remanded.

MAULL vs. THE STATE.

[INDICTMENT FOR LIVING IN ADULTERY.]

1. *Sufficiency of indictment*.—An indictment, charging that a man and a woman "did live in a state of adultery or fornication," but not stating that they thus lived *with each other*, nor otherwise showing that they were guilty of a joint offense, is demurrable for duplicity.

FROM the Circuit Court of Jefferson, on change of venue from Blount.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case charged, "that John Mauil, a man, and Mary Johnson, a woman, did live in a state of adultery or fornication, against the peace and dignity of the State," &c. The prisoners demurred to the indictment, "because it did not charge that they lived together, or with each other, in a state of adultery or fornication;" but the court overruled the demurrer.

WATTS, JUDGE & JACKSON, for the prisoner, cited *Moore v. The Commonwealth*, 6 Metcalf, 243.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[Jan. 22, 1861.]—The offenses charged to have been committed by the defendants, do not appear from the indictment to have been perpetrated by any joint act; but, for aught disclosed, may have been, altogether distinct, neither defendant participating in the criminal act of the other. For this reason, the indictment was demurrable for duplicity.—*Shaw v. State*, 18 Ala. 547.

The judgment of the court below is reversed, and the cause remanded.

McGUIRE vs. THE STATE.

[INDICTMENT FOR FORGERY.]

1. *Oath of petit jury*.—If the jury, in a criminal case, are sworn "well and truly to try the issue joined," this is a substantial compliance with the requisition of the statute, (Code, § 3478,) and is sufficient.
2. *Conclusion of indictment*.—If an indictment concludes "against the peace and dignity of the State of Alabama," it is not necessary that each count in it should so conclude.
3. *Sufficiency of indictment in description of forged instrument*.—"An instrument of writing, purporting to be an order, drawn by Sister Adeline, on George Pattiste, for nine dollars,"—is a sufficient description, in an indictment, of the instrument alleged to have been forged.
4. *Sufficiency of indictment, in statement of time*.—In an indictment under the Code, it is not necessary to state the time when an offense was committed, or to allege that it was done before the finding of the indictment.
5. *Abstract charge*.—An abstract charge, or one which is not shown by the record to have been predicated on some evidence before the jury, is properly refused.
6. *What constitutes forgery*.—Under an indictment for forgery, a conviction may be had on proof that the prisoner, with intent to de-

fraud, uttered and published as true a forged instrument, knowing it to be forged.

FROM the City Court of Mobile.

Tried before the HON. ALEX. MCKINSTRY.

THE indictment in this case was in these words:

"The grand jury of said county charge, that, before the finding of this indictment, John McGuire forged an instrument of writing, purporting to be an order, drawn by Sister Adeline, on George Battiste, for nine dollars, with intent to defraud. The grand jurors further charge, that John McGuire forged an order for money, in words and substance as follows: 'Mr. George Battiste will please pay to Mr. McGuire nine dollars, by order of Sister Adeline,' with intent to defraud; against the peace and dignity of the State of Alabama."

The defendant demurred to the indictment, and assigned the following grounds of demurrer: "To the first count, because it does not set out the tenor or substance of the instrument charged to have been forged, nor does it show any reason for not so setting out said instrument; and because it does not conclude, 'against the peace and dignity of the State of Alabama;' and to the second count, because it does not allege or name any day or time when the said offense was committed." The court overruled the demurrer, and the defendant excepted.

"On the trial," as the bill of exceptions states, "there was some evidence tending to show that the forged instrument was in the words in which it was described in the indictment. There was some evidence, also, tending to show that the defendant went to George Battiste, to get the money of John Martin; that Battiste told him he must get an order from the head sister of the 'Sisters' Hospital,' before he could get it; that the defendant went away, and came back with such an order, and an order for nine dollars, signed 'Sister Adeline,' and got the money for the latter order. The prosecuting attorney asked a witness, if there was a person in the 'Sisters'

Hospital' by the name of 'Sister Adeline.' To this question the defendant objected, and reserved an exception to the overruling of his objection."

"The defendant asked the court to give the following charges: '1. If the jury believe that *Sister Adeline* is a fictitious name, they cannot find the defendant guilty of forgery.' '2. They cannot find the defendant guilty, unless it was proved that he wrote the order in Mobile county.' The court refused these charges, and the defendant excepted to their refusal."

The judgment-entry recites, that the jury were sworn "well and truly to try the issue joined;" and that their verdict was, "guilty of forgery in the second degree."

BEN LANE POSEY, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—[Feb. 28, 1861.]—The oath administered to the jury in this case was sufficient.—*Crist v. The State*, 21 Ala. 137; *Pile v. The State*, 5 Ala. 72.

[2.] The indictment concludes, "against the peace and dignity of the State of Alabama," and that is sufficient. Cons. Ala., art. 5, sec. 17.

[3-4.] Each count in the indictment is sufficient. Code, §§ 3158-65; Code, 703.

[5.] There is no evidence in the record that *Sister Adeline* was a fictitious person; and therefore, the first charge asked was abstract, so far as we can discover. There was no error in refusing it.

[6.] The second charge asked, should not have been given. It demanded an acquittal, if the evidence failed to prove that the order was *written* by the defendant in Mobile county. If the proof showed that the prisoner, in Mobile county, uttered and published the order as true, knowing it to be forged, and with intent to defraud, the law requires that he should be adjudged guilty of the forgery of the instrument. The charge restricted the right to convict within too narrow bounds, and was

rightly refused.—Code, § 3165; *Thompson v. The State*, 80 Ala. 28; *Bishop v. The State*, *ib.* 34.

Judgment of the city court affirmed, and its sentence to be executed.

JOHNSON vs. THE STATE.

[INDICTMENT FOR WILLFUL OR MALICIOUS MISCHIEF.]

1. *Constituents of offense.*—Malice is a necessary ingredient of the offense denounced by section 3114 of the Code; but, under section 3115, if the act is either willful or malicious, the offense is complete.
2. *When witness may give opinion as to value of animal.*—Under an indictment for willfully or maliciously shooting a mule, a witness who was acquainted with the mule both before and after the infliction of the injury, but who has no skill in veterinary or medical science, may state his opinion as to the extent of damage caused by the wound.

FROM the Circuit Court of Shelby.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case contained two counts; the first charging, that the defendant, Martin Johnson, "willfully or maliciously injured a mule of some value, belonging to William Richards;" and the second, that he "willfully or maliciously disfigured a mule," &c. No objection was made to the indictment; and the only plea was not guilty. On the trial, as appears from the bill of exceptions, "the State introduced proof tending to show that, within six months before the finding of the indictment, and in said county, the mule which was described in the indictment as the property of William Richards, received a gun-shot wound, which was inflicted by the defendant;" and there was evidence tending to show that said mule

was the property of said Richards. "One McClellan, a witness for the State, who was a farmer, testified, that he had raised, bought and sold horses and mules, and always judged for himself, and did his own trading in such things; although he had no skill in veterinary science; and had never treated medically a gun-shot wound; that he was well acquainted with said mule, before and at the time it was shot, as well as since that time; that he examined the wound the day the mule was shot, when it was fresh, and had examined it after it healed; that the wound was in the shoulder, and the shoulder had thereby become enlarged; that the mule was worth one hundred and fifty dollars before it was shot, and that, in his opinion, the damage or injury done to the mule by the wound was fifty dollars." The defendant objected to the witness giving his opinion, as to the damage or injury done to the mule by the said wound; but the court overruled the objection, and permitted the evidence to go to the jury; to which the defendant excepted." The court charged the jury, among other things, "that it was not necessary for the State to prove, that the defendant, if he shot the mule, was actuated by malice, either towards the mule, or towards its owner;" to which charge also, the defendant reserved an exception. The several rulings of the court to which exceptions were reserved, are now assigned as error.

HEFLIN, MARTIN & FORNEY, for the defendant, cited the following cases: The State v. Pierce, 7 Ala. 728; M. & W. P. Railroad Co. v. Varner, 19 Ala. 185; Norman v. Wells, 17 Wendell, 136.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[July 18, 1861.]—The statute under which the defendant was indicted, is in the following words: "Any person, who *willfully or maliciously* injures or disfigures any horse, mare, gelding, colt, filly, ass, or mule, the property of another, must, on conviction, be fined not less than five times the amount of the injury

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done, and may be imprisoned not more than six months." Code, § 3115: The indictment is not framed under section 3114, which prescribes the punishment of a person "who unlawfully and maliciously kills or disables any animal belonging to another, or unlawfully and maliciously injures or destroys any article or commodity of value, the property of another."—Code, § 3114. An obvious difference between the two sections is, that under the former, willfulness or malice, characterizing the specified act, is sufficient to constitute the offense; while under the latter, unlawfulness and malice are necessary ingredients of the offense. A like difference exists, between the statute under which the indictment in this case was framed, and the statute which was construed in *State v. Pierce*, 7 Ala. 728.—*Clay's Digest*, 417, § 5. This last-named statute expressly required, that the act should be unlawful, willful, and malicious; and it was in reference to that statute, that the court, in arguing the question before it, declared malice against the owner of the animal to be an essential element of the offense. That dictum, made in arguing the construction of such a statute, is entitled to no influence upon the question presented in this case. Under the statute now under consideration, the willful performance of the specified acts, as well as the malicious performance of them, constitutes the offense. It was, therefore, proper for the court to charge the jury, that proof of malice towards the mule or its owner was not indispensable.

[2.] We think the court below committed no error, in permitting the State to prove that the damage or injury done to the mule was fifty dollars. Considering this evidence in connection with the evidence which precedes it, we understand it to amount to nothing more than the expression of the opinion of the witness, that the value of the mule was diminished fifty dollars by the injury done to it. It is but a comparison of the value before and after the injury; and such a comparison it was certainly competent for the witness to make.—*Ward v. Reynolds*, 32 Ala. 385. We do not think the question

decided in the *M. & W. R. R. Co. v. Varner*, (19 Ala. 185,) at all analogous to that presented in this case.

Affirmed.

SCHWARTZ vs. THE STATE.

[INDICTMENT FOR PUBLIC NUISANCE.]

1. *Sufficiency of indictment.*—An indictment under the act of 1858, "to prevent nuisances and illegal trafficking with slaves," (Session Acts 1857-8, p. 285,) which charges that the defendant "kept, or was engaged in the keeping of, a public nuisance, by having permitted slaves, or free persons of color, habitually to visit, assemble, stop at, or loiter about, the house or premises kept or occupied by him,"—is sufficient, being in the form authorized by the third section of the act, and is not violative of any constitutional provision.
2. *What constitutes offense.*—To authorize a conviction under this statute, although it is necessary that three respectable witnesses for the State shall testify that the general reputation of the defendant, or that of his house, "as to trading or trafficking illegally with slaves," is bad, it is not necessary that the jury should find that fact to be proved; nor is it necessary for the State to prove the defendant's permission or consent that slaves, &c., should visit, or loiter about his premises; nor it is necessary that the defendant should be a licensed retailer.

From the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THE indictment in this case was founded upon the act of February 6, 1858, entitled "An act to prevent nuisances and illegal trafficking with slaves," which is in the following words:

"SECTION 1. *Be it enacted,*" &c., "That the keeping of every house in this State, where spirituous liquors are sold, retailed, or given away, and which slaves or free

persons of color habitually visit, assemble, or stop at, or loiter about, is hereby declared to be a public nuisance; *provided*, the general reputation of such house, or of the keepers thereof, as to trading or trafficking with slaves, is bad.

"SECTION 2. *Be it further enacted*, That every person who keeps, or engages in the keeping of any such house, shall be liable to indictment therefor, and, upon conviction thereof, shall be fined for the first offense in any sum the jury trying the case may assess, not less than fifty dollars, nor more than two hundred dollars; and for the second, and every subsequent offense, shall be fined not less than two hundred dollars, nor more than one thousand dollars, and be imprisoned in the common jail of the county, not less than ten days, nor more than six months, one or both, in the discretion of the jury trying the offense; *provided*, the person so convicted the second time for the same offense, shall not have license granted him or her again in the same county.

"SECTION 8. *Be it further enacted*, That in all prosecutions under this act, it shall be sufficient for the indictment to state, that the defendant, before the finding of the indictment, kept, or was engaged in the keeping of a public nuisance, by having permitted slaves, or free persons of color, habitually to visit, assemble, or stop at, or loiter about, the house or premises kept or occupied by the defendant.

"SECTION 4. *Be it further enacted*, That before any conviction can be had in any prosecution under this act, it shall be incumbent on the State to prove, by three or more respectable witnesses, that the general reputation of the house, or of the keeper thereof, for the keeping of which the indictment is found, as to trading or trafficking illegally with slaves, is bad."—Session Acts, 1857-8, p. 285.

The indictment charged, "that Peter Schwartz, before the finding of this indictment, kept, or was engaged in the keeping of a public nuisance, by having permitted slaves, or free persons of color, habitually to visit, assem-

ble, stop at, or loiter about, the house or premises kept or occupied by said defendant; against the peace and dignity," &c. After conviction, the defendant moved in arrest of judgment, "for matters apparent upon the indictment;" but his motion was overruled.

"On the trial," as the bill of exceptions states, "the State gave in evidence that the defendant kept a grocery-store in the city of Montgomery, on the 1st April, 1858, and had been keeping it since the 6th February, 1858; and that gangs of negroes, from three to twenty in number, were frequently seen, between those periods, in front of his store, and on the side-walk at the corner of the street where his shop was. One witness testified to the fact, that liquor was kept in the store; but he could not remember having seen any sold there, previous to the finding of the indictment. Another witness testified, that he saw the defendant sell bottles of brandy in January, 1858, but never since. The State also gave in evidence, that the reputation of the house, and of the defendant, for trading with slaves, was bad; five witnesses testified to that fact. The defendant then gave in evidence, that he kept a grocery for the sale of family groceries; and several witnesses testified, that they had bought all their family supplies from him during that period, and visited his store to do so, and never saw a drop of liquor sold by him during that time. Five witnesses testified, that his (?) general character of his house, as to trading with slaves, was good; and one witness testified, that he had twice seen the defendant try to drive the negroes away from the corner where his store was, and had heard him say to them, at the same time, that they had no business there. One witness for the defendant testified, that he was a near neighbor of the defendant, and had been living on the square adjoining the defendant for a long time, both before and after the time charged in the indictment, and was well acquainted with him and his neighbors, and knew his general character; but he could not say that he knew his general character, or that of his house, for trading or trafficking

illegally with slaves; but he had heard the neighbors generally repeatedly speak of the defendant, *and never heard a word said by any of them about his trading or trafficking with slaves in any way.* On motion of the State, the court excluded the words" which are italicised; "and the defendant excepted. There was no evidence whether the negroes seen at or near the defendant's shop, as above stated, were slaves or free persons of color; nor were their names given, or any description or identification of them.

"This being all the evidence, the court charged the jury, that if they believed, from the evidence, that the defendant had a house where liquor was sold; and that gangs of negroes had habitually loitered about his premises; and that all the loitering about his premises consisted in negroes being on the public side-walk in the street, and on the corner of the street, where the defendant kept his store; and that the general reputation of the defendant and his house, between the 6th February, 1858, and the finding of the indictment, for trading with slaves, was bad, and had been testified to by three respectable witnesses,—then he was guilty under the indictment.

"The court further charged the jury, that if they believed, from the evidence, that gangs of negroes, from three to twenty in number, had been in the habit of standing about on the side-walk in the street, and at the corner of the street, between the 6th February, 1858, and the finding of the indictment,—then this was such a loitering about the defendant's premises as was contemplated by the statute, even if it had not been established by evidence that it was done by his consent or permission.

"The defendant excepted to each of these charges, and requested the court to instruct the jury, (1st,) 'that unless the negroes who were in the habit of standing on the side-walk at the corner of the street, where the defendant's store was, did so by the consent, permission, or approbation of the defendant, they cannot find him

guilty;' (2d,) 'that if the only evidence before them, to establish that the general character of the defendant or his house was bad, was, that it was bad as to trading with slaves, this is not sufficient, unless they find and believe, from the evidence, that he had traded illegally with slaves.' The court refused both of these charges, and the defendant excepted to their refusal."

JNO. A. ELMORE, for the prisoner.

M. A. BALDWIN, Attorney-General, *contra*.

STONE, J.—[April 1, 1861.]—The statute which we are to construe in this case, had for its object the correction of an evil which exists in every slaveholding community, namely, illegal traffick with slaves. The arts and devices of petty traders have generally been such as to elude our penal enactments; and, consequently, slaves have continued to be demoralized, by having held out to them incentives to theft, that they may thereby procure the means of gratifying a corrupted and corrupting appetite. The object of the present enactment was, to reach and prevent the offense, which can rarely be proved because of its secrecy, by seizing upon and punishing another offense against the good government and well-being of slaves, which usually attends upon and evidences the more grievous offense.

The statute, though well conceived to carry out the object of the legislature, is, nevertheless, not expressed with such precision as to leave no doubt or difficulty in its exposition.—See Pamph. Acts, 1857-8, p. 285. The first, third, and fourth sections, are those which create the difficulty. The first section defines the offense; the third relates to the indictment; and the fourth, to the proof. The language of the several sections is variant. Section 1 declares, "that the keeping of every house in this State, where spirituous liquors are sold, retailed, or given away, and which slaves or free persons persons of color habitually visit, assemble, or stop at; or loiter about, is hereby declared to be a public nuisance; *provided*, the general

reputation of such house, or of the keepers thereof, as to trading or trafficking with slaves, is bad." Section 3 provides, "that, in all prosecutions under this act, it shall be sufficient for the indictment to state, that the defendant, before the finding of the indictment, kept, or was engaged in the keeping of a public nuisance, by having permitted slaves or free persons of color habitually to visit, assemble, or stop at, or loiter about, the house or premises kept or occupied by the defendant."

The indictment in this case pursues section 3, and contains nothing beyond its specified requirements. It is urged for the defendant, that this indictment does not conform to the bill of rights, because it fails to set forth "the nature and cause of the accusation."—Bill of rights, § 10; Code, p. 30. A further objection urged against it is, that it is not framed according to the forms which the law has prescribed. We have duly considered these objections, and it is our opinion, that they are not well taken.

This statute is a public one, and all men are charged with a knowledge of its contents.—*Erwin v. Hamner*, 27 Ala. 296. All men, in reading an indictment framed under the third section, are reasonably informed that the indictment charges the offense denounced by the first section. In fact, it may admit of question, if such is not the result of the legal intendment, which presumes that every one knows the law. Be this as it may, enough is stated in the indictment to inform the defendant of the nature and cause of the accusation. The non-professional reader will be better informed of the nature and cause of the accusation by the simple statement found in this record, than he would be by the technical verbosity which prevailed a century ago.

Nor is this a new question in this court. Several of the Code forms of indictments are defective, under the argument made in this case; for they omit to aver many facts, which are necessary to be proved to insure a conviction. Many of them aver facts disjunctively, and all of them omit all mention of the county in which the offense was committed.—See Code, §§ 2244, 3506, 3507; also, forms

Nos. 7, 26, 29, 31, 33, 66, 67, 68, 71, 74, &c. These forms we have invariably held sufficient.—See the authorities collected, Shep. Dig. 71-2. In *Noles v. The State*, (24 Ala. 672,) our predecessors ruled, that the constitution does not inhibit the legislature from introducing forms of indictment, variant from those of the common law. They further ruled, that, if the form of indictment prescribed by the statute contain such an accusation at the suit of the State, found by a grand jury, as furnishes to the accused reasonable information of what he is called on to answer, by setting forth the constituent elements of the offense, it will be sufficient, although it may omit many averments that were necessary at common law. The indictment in this case is in the form which the law has prescribed, and, under the rules above declared, it is sufficient.

The fourth section of the act under which the defendant was tried, is in the following language: "Before any conviction can be had in any prosecution under this act, it shall be incumbent on the State to prove, by three or more respectable witnesses, that the general reputation of the house, or the keeper thereof, for the keeping of which the indictment is found, as to trading or trafficking illegally with slaves, is bad." On a comparison of the sections 1, 3, and 4 of this statute, it will be discovered that each is different from the others. Section 1 declares, that certain elements shall constitute a public nuisance; section 3 relates to the indictment; and section 4 declares, that certain proof shall be made before a conviction can be had. Section 3 omits all mention of many of the ingredients of the offense, as found in section 1; while section 4, in speaking of the proof to be made, contains the word *illegally*, which is not found in section 1. Now, we think these difficulties vanish, when we consider the purpose for which each separate section appears to have been inserted. Section 1 defines the offense, and its constituent elements: section 3 declares what shall be a sufficient indictment; and section 4 requires, that certain proof shall

be made, preliminary to a conviction. The first declares what shall be found by the jury; the third, what shall be alleged by the pleader; and the fourth, what shall be deposed to by three or more respectable witnesses. To allow section 4, which relates to the testimony, to enlarge the constituent elements of the offense which section 1 defines, would seem to be as illogical, as to allow section 3, which defines the indictment, to restrict those constituent elements.

If it be asked, why require the witnesses to testify that the character for trafficking *illegally* with slaves is bad, if that be not one of the facts to be found by the jury;—we answer, it was certainly within the power of the legislature to make such a rule, and it is not for us to question the exercise of that power. The offense is complete, under section 1, if only *free persons of color* habitually visit, assemble, or stop at, or loiter about, a house of the kind mentioned in the statute, provided the general reputation of such house or the keeper thereof, as to trading or trafficking with slaves, is bad. It is not complete, if *slaves* habitually visit, assemble, &c., at such house, unless the reputation of the house or its keeper, for trading or trafficking with slaves, is bad.

In *Jordan v. Owen*, (27 Ala. 152,) we decided, that a plaintiff, testifying in his own case to an indebtedness to him, must go farther, and swear that the debt is unpaid. Yet no one would contend, that, in such case, the charge of the court should authorize that body to find against the plaintiff, if he had not satisfied them that the debt was not paid. The proof, in such case, getting before the jury, if the plaintiff make out a *prima-facie* case of indebtedness, the *onus* of showing a payment would, in the case supposed, as in all other cases, rest on the defendant: *Hi incumbit probatio, qui dicit*. The testimony in such case, to be legal, must contain positive and negative averments; while the finding of the jury need only respond affirmatively.

A fair illustration of the argument we are making, may be seen in the following supposed case. It is said

to be a rule of the common law, not to convict of murder, unless the dead body has been found. Now, suppose an act of the legislature should declare, that no conviction for murder should be had, unless three respectable witnesses should testify that they had seen the dead body. On a trial, three respectable witnesses testify as the statute requires; but the jury are convinced that one of the witnesses is mistaken, and that in fact he never saw the dead body. Still the jury are convinced, beyond reasonable doubt, that the prisoner had committed the offense charged. Would any one contend, that, under the influence of such supposed statute, the prisoner should be acquitted? So, under this statute, we hold, that section 4 is not introductive of any new fact to be found by the jury; but that, out of abundant caution, its purpose was to screen the defendant from conviction, save on the testimony of three or more respectable witnesses on the question of character.

It may be questioned, whether there can be such thing as general bad character or reputation for trading or trafficking with slaves, unless such trading or trafficking was illegal; in other words, that a trader, who dealt with slaves legally, could not thereby acquire a bad reputation. In answer to this we say, the legislature have inserted the word *illegally*, in defining the measure of proof, and we prefer not to say they had no object in doing so. We hold, then, that the testimony must conform to section four, but the finding need only respond to the requirements of section one.

The bill of exceptions in this case purports to set out all the evidence. Five witnesses testified, that the general reputation of the defendant; for trading or trafficking with slaves, was bad; but no witness employed the word *illegally*. In the first charge given to the jury, the circuit court, on this point, said, in effect, that if three respectable witnesses had testified that the defendant's general reputation for trading or trafficking with slaves was bad, this would meet the requirements of the law. This was an error.

The second charge is, perhaps, obnoxious to criticism, in this—that it does not sufficiently confine the assembling or loitering of the slaves, or free persons of color, to a place or places *at* or *about* the premises of the defendant. This will be remedied on another trial.

It was not necessary that the State should prove affirmatively, that the defendant permitted, or consented, that slaves should *visit, stop, or assemble at, or loiter about* his premises. The police of his own premises was under his control, and it was both his privilege and duty to drive them away. If he did not do so, that provision of the statute was violated.

It was not necessary that the defendant should have been a licensed retailer. If he kept a house where spirituous liquors were *sold, retailed, or given away*, that was sufficient. The phrase, “shall not have a license granted to him or her again,” is a verbal inaccuracy. Its meaning is *afterwards*, as is shown by other provisions of the statute.

What we have said will sufficiently guide the circuit court in another trial.

Reversed and remanded.

SMITH ET AL. VS. THE STATE.

[INDICTMENT FOR GAMING.]

1. *Conviction on testimony of accomplices.*—Where a witness testifies, that he was present while the several defendants played a number of games with cards; that at the request of one of the players, who did not understand the game well, he sat behind him, and from time to time, during the whole continuance of the games, instructed him how to play; that he took a card, on one or two occasions, from the hand of said unskillful player, and threw it down on the table for him, and, on one occasion, during the mo-

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mentary absence of said player, played one of his cards for him; and that he was also engaged in reading a part of the time,—the court may refuse to instruct the jury, that said witness was an accomplice, (Code § 3600,) and that a conviction could not be had on his uncorroborated testimony.

2. *What constitutes public house.*—A lawyer's office is a public house, within the prohibition of the statute against gaming, (Code, § 3243,) and where it consists of two rooms, front and back, connected by a door, in each of which professional business is transacted, the two rooms are equally within the statute.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. A. A. COLEMAN.

In this case, George Frank Smith, Marcellus A. Coleman, M. VanCamp and Charles Hill were jointly indicted for gaming; the indictment being in the general form prescribed by the Code. "On the trial," as the bill of exceptions states, "the State introduced one Moody as a witness, who testified, that within twelve months before the finding of the indictment, and in said county of Choctaw, the defendants played several games with cards, (called 'euchre,') in the law-office of George F. and G. Frank Smith, practicing attorneys; that said office was situated on the street facing the public square in the town of Butler, in which public square is the court-house; that there were two rooms in said office, with a door leading from one to the other; that the law-books of said attorneys were kept in the front room, and business was done with the public in both rooms, but usually in the back room, where the writing-table of one of said attorneys was situated; that the playing was done in said back room; that the door between the two rooms and the windows were closed, and the back door could not be seen from the street; that witness, at the request of Charles Hill, who did not understand the game well, sat behind him, and, from time to time, instructed him how to play; that this information was given by him to said Hill, from time to time, during the whole continuance of the games; that he took a card, on one or two occasions,

from said Hill's hand, and threw it down on the table for him; that on one occasion, while said Hill was momentarily absent from the room, he took up his cards, and 'passed' for him, (which is a technical expression in the game,) and that he (witness) was also reading a medical book a part of the time the game was going on." This being all the evidence, the defendant requested the court to instruct the jury, 1st, "that the said witness was an accomplice, within the meaning of section 3600 of the Code, and that a conviction could not be had on his testimony alone;" and, 2d, "that the house in which the playing took place, was not a public house within the meaning of section 3243 of the Code." The court refused these charges, and the defendants excepted to their refusal.

WILLIAM BOYLES, for the defendants.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[June 20, 1861.]—The witness only participated in the playing by aiding an unskillful player with his advice, and at one time doing some little acts, during a brief absence of such unskillful player, in his place. These acts were not of such character as necessarily to constitute the witness an accomplice, when he was not engaged in the performance of them. During a part of the playing, the witness was engaged in reading. While he was so engaged, it cannot be affirmed, as a legal conclusion, that he was either assisting in the game, or participating in it. The offense may have been complete, by what was done during the time occupied by the witness in reading.—*Swallow v. State*, 20 Ala. 30; *Cannon v. State*, 15 *ib.* 338; *Coggins v. State*, 7 Porter, 263. The court was, therefore, not authorized to assume conclusively, that the witness was an accomplice at all the points of time when enough was done to authorize a conviction. This the court was, in the first charge asked, requested to do; or, at least, that was the effect of the charge. There was, therefore, no error in the refusal.

[2.] There was no error in the refusal of the second charge requested.

Affirmed.

BASS vs. THE STATE.

[INDICTMENT FOR BETTING AT TEN-PINS.]

1. *Conviction on testimony of accomplice.*—Under the act of 1854, (Session Acts, 1853-54, p. 30,) as amended by the act of 1858, (Session Acts, 1857-58, p. 267,) it is the betting at ten-pins, and not merely playing the game, that constitutes the offense; consequently, a person who engages in the game, and does not participate in the betting, is not an accomplice, within the meaning of section 3600 of the Code, which forbids a conviction on the uncorroborated testimony of an accomplice.
2. *When objection to grand jury may be made.*—The objection cannot be raised for the first time in the appellate court, that the record fails to show that the grand jurors were regularly selected and summoned.
3. *Constituents of offense.*—To constitute the offense of betting at ten-pins, (Session Acts, 1857-58, p. 267; *ib.* 1853-54, p. 30,) it is not necessary that the game should be played at one of the places enumerated in section 3248 of the Code.

From the Circuit Court of Covington.

Tried before the Hon. JNO. K. HENRY.

THE indictment in this case charged, that the defendant, within twelve months before the finding of the indictment, and after the 8th February, 1858, "bet at ten-pins, or some such game, which betting was not for the game." The defendant demurred to the indictment, for duplicity, for uncertainty, because it did not sufficiently describe the offense, and because it did not allege that the game was played at one of the places specified in section 3248 of the Code; but his demurrer was over-

ruled. "On the trial," as the bill of exceptions states, "the State introduced one Rue as a witness, who testified, that the defendant and one Carson, within twelve months before the finding of the indictment, agreed to roll a game of ten-pins at a public alley in the town of Andalusia in said county, and bet the feed of two yokes of oxen for three weeks on the result of said game; that Carson asked him to roll the game for him; that he and Carson rolled said game against defendant and another person, whose name he did not recollect; that they went to the bar several times during the game, and drank liquor; that Carson won the game, and a controversy then arose between him and the defendant, as to the construction of the bet; that the game was played in Covington county, on a public alley in the town of Andalusia, which was kept for play and pay, within twelve months before the finding of the indictment; that he had no interest whatever in the bet made on the game, or for the alley fees, or for the liquor drunk; that he paid for nothing, and neither won nor lost anything on the game; and that his only connection with the game was to join in the rolling for Carson, and at his request." The defendant asked the court to instruct the jury, "that if they found, from the evidence, that the witness Rue was engaged in rolling the game for Carson, and did nothing but roll for him, and took no part in the betting, but drank with the others at the conclusion of the game, he was an accomplice, and they could not convict the defendant on his uncorroborated testimony." The court refused this charge, and the defendant excepted to its refusal.

JOHN MCCASKILL, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—[July 9, 1861.].—1. The test, by which to determine whether a witness, who has been introduced by the State, is an accomplice within the meaning of section 3600 of the Code, is the inquiry, could the witness himself have been indicted for the offense, either

as principal or accessory?—See *Davidson v. State*, 33 Ala. 350; Bouvier's Dict., "Accomplice." Under the act of Feb. 17, 1854, (Acts '53-4, p. 20,) as amended by the act of Feb. 8, 1858, (Acts '57-8, p. 267,) it is the betting at ten-pins, and not merely playing the game, that constitutes the offense. As the witness did not bet, and was not concerned in the bets made by others who took part in the game, he could not have been indicted; and therefore, was not an accomplice.

[2.] The objection, that the record fails to show that the grand jury was regularly selected and summoned, cannot be made for the first time in this court.—Code, § 3591; *Shaw v. State*, 18 Ala. 549; *Nugent v. State*, 19 Ala. 540; *Floyd v. State*, 30 Ala. 511; *Russell v. State*, 33 Ala. 366.

[3.] It is not necessary to constitute the offense of betting at ten-pins, that the playing should take place at one of the places enumerated in section 3243 of the Code. Hence, the objection to the indictment was not well taken.

Judgment affirmed.

EX PARTE KELLY, ET AL.

[APPLICATION FOR HABEAS CORPUS.]

1. *Jurisdiction of State courts to discharge person in custody for violation of criminal laws of United States.*—The courts of this State have now (July 9, 1861,) no jurisdiction to discharge from custody a person who was arrested prior to the passage of the ordinance of secession, charged with a violation of the criminal laws of the United States within the limits of the State of Virginia; the question of his right to be discharged, or his transfer to the proper court in Virginia for trial, appertaining to the jurisdiction of the district court of the Confederate States.

APPLICATION by John Kelly and Richard Dodge, *alias* Richard Horton, for the writ of *habeas corpus*, or other remedial process, to obtain their release from imprisonment in the county jail of Mobile. The petitioners were arrested under a warrant, dated November 2, 1860, issued by a justice of the peace in Mobile, (acting under the authority conferred on him by the act of congress approved the 24th September, 1789, known as the "judiciary act,") on a charge of assault and battery and robbery, "said to have been committed by them, on the person of one Martin Green, in the month of September, 1860, on board the American ship *Eastern Star*, in the Potomac river, near its mouth, and contiguous to the Chesapeake bay;" and were committed to jail by the justice, to answer said charge "before the next grand jury for the United States of America." At the December term, 1860, of the district court of the United States for the southern district of Alabama, Hon. Wm. G. Jones presiding, the grand jury investigated the case, and returned into court a report in writing, in which they stated, that they were satisfied of the commission of the offense by the prisoners, but were advised that the court had no jurisdiction of the case, except to order its transfer, and the removal of the prisoners for trial, to the proper tribunal; and the court thereupon made an order, on the 11th January, 1861, (the day on which the Alabama ordinance of secession was adopted,) directing the United States marshal of that district to remove the prisoners to the eastern district of Virginia, and to deliver them to the marshal of that district. On the 8th February, 1861, the prisoners sued out a *habeas corpus* before the Hon. HENRY CHAMBERLAIN, the judge of the city court of Mobile, who, on the hearing of the case, remanded them to jail; and on the 7th March, 1861, they renewed their application to this court. The opinion of this court was delivered on the 9th July, 1861.

F. S. BLOUNT, for the prisoners.—1. The order of Judge Jones, having been made on the day the Alabama ordi-

nance of secession was passed, is void.—*Arnold v. United States*, 9 Cranch, 104. That ordinance was a revocation of the entire legislation of the United States congress, within the limits of this State; and this state of things continued until the 26th January, when the convention adopted such portions of the United States laws as they deemed necessary for the government of the State.

2. The ordinance of 26th January, continuing and transferring to State courts the cases pending in the United States courts, expressly excepts from its operation those cases "in which the United States of America is plaintiff;" and the effect of this exception is to discontinue all prosecutions at the suit of the United States. The adoption of the act of 1825, respecting crimes against the United States, by the 6th section of that ordinance, was prospective in its operation, and could not revive a criminal prosecution which had been discontinued.

3. The prisoners have committed no offense against the laws of Alabama. They are charged with the commission of an offense, outside the limits of the State, against a government whose laws and jurisdiction, within this State, are abolished; and there is now no law by which they can be detained or punished. Nor has the United States, though now a foreign government, any right to demand their surrender for trial, since that is a right, which only exists by virtue of treaty stipulations; and any treaty between the United States and the Confederate States, hereafter made, would not reach their case.—2 Brock. C. C. 493.

4. Unless discharged by authority of a State court, the prisoners are without remedy; the ordinance of secession having abrogated the constitution of the United States, its laws, courts, judges, and officers. The following authorities are referred to: *Rose v. Himely*, 4 Cranch, 291; *Elliott v. Piersol*, 1 Peters, 340; *Exchange v. McFadden*, 7 Cranch, 116; *Williams v. Suffolk Ins. Co.*, 3 Sumner, C. O. 270; *Vattel's Law of Nations*, (ed. 1829,) 58-66.

A. J. WALKER, C. J.—[July 9, 1861.]—We think

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that, *at this time*, the application for the *habeas corpus* in this case appertains to the jurisdiction of the district court of the Confederate States of America; and that guided by the decision in *Ableman v. Booth*, (21 How. 506,) which we recognize as an able and correct exposition of the law, we have no authority to interfere in the matter. We state, briefly, the reasons that lead us to that conclusion.

The ordinance of the convention of the State of Alabama, conferring the judicial power of the courts of the United States in this State upon the State courts, was limited in its operation to the time when the congress of the Confederate States should otherwise dispose of the jurisdiction. The constitution of the provisional government, in its third article, bestows that jurisdiction upon the district courts; and bestows upon the congress of the Confederate States power to make laws for the transfer of causes, pending in the courts of the United States, to the courts of the Confederacy; and also for the execution of the orders, decrees and judgments theretofore rendered by the courts of the United States. Section fifty of the act of the provisional congress, to establish the courts of the Confederate States, adopted March 16th, 1861, provides, that no person now under arrest, or in custody, upon any criminal charge or offense, on process issued from the courts of the United States, shall be released by reason of the dissolution of the Union; but he shall continue under arrest, or in custody, until discharged by due course of law. The State of Virginia is now a member of the Confederacy; and an act of congress, approved 9th February, 1861, continues all laws of the United States in force and in use in the Confederate States of America on the first day of November last, and not inconsistent with the constitution of the Confederate States.

In view of the constitutional and legislative provisions above stated, we are not prepared to decide, that the judge of the district court is without authority to transmit the prisoners to the proper court in Virginia for trial,

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as might have been done under the laws of the United States, if the Union had not been dissolved.—Brightley's Digest, p. 90. At all events, we feel entirely clear in the opinion, that the question of the prisoners' right to a discharge is a matter now appertaining to the jurisdiction of the district court of the Confederate States; and it would be improper for us, at this time, to grant to the prisoners any remedial process.

Motion refused.

ISHAM (A SLAVE) vs. THE STATE.

[INDICTMENT AGAINST SLAVE FOR HOMICIDE OF WHITE PERSON.]

1. *Homicide of white person by slave.*—If a slave kills a white person, believing him at the time to be a runaway negro, and being justified by the attendant circumstances in the belief, the degree of the homicide—whether murder, voluntary manslaughter, or involuntary manslaughter—is the same that it would have been if the person slain had been a runaway negro; but the punishment of the offense is that prescribed for such degree of homicide when perpetrated by a slave on a white person.
2. *Conviction of less offense than charged in indictment.*—Under an indictment charging a slave with the voluntary manslaughter of a white person, a conviction may be had for involuntary manslaughter in the commission of an unlawful act.

FROM the Circuit Court of Jefferson.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case contained three counts; the first charging that the prisoner, who was a slave, the property of Capt W. F. Hanby, "unlawfully, and with malice aforethought, killed George M. Hagood, by shooting him with a gun;" the second, that he "unlawfully and intentionally, but without malice, killed George M.

Hagood, a white person," &c.; and the third, that he "unlawfully, but without malice or the intention to kill, killed George M. Hagood, a white person," &c. The circuit court sustained a demurrer to the third count, and the prisoner pleaded not guilty to the other counts.

"On the trial," as the bill of exceptions states, "the prosecution introduced a witness, who testified, that, on the night the deceased (who was a white man) was killed, he, in company with the deceased and two other white men, went by agreement to the house of the prisoner's master, (all the white family being absent,) for the purpose of catching a runaway slave, who was said to be lurking about the place, and of detecting the prisoner in harboring said runaway, if guilty of so doing; that the deceased and himself disguised themselves, by blacking themselves, putting on old clothes, and having a budget tied up in a handkerchief; that they went near the negro house, and made a noise there, and then went to the corner of the house, and struck on it with a stick; that the dog barked fiercely during the time, and the prisoner hissed on the dog; that the prisoner came round the house, and, as soon as he got in sight, asked, 'Who are you?' that the deceased replied, 'A partner,' and, as soon as the reply was out, the prisoner fired, and killed the deceased; that he (witness) then said, 'Don't shoot, you have killed Mansfield;' that the prisoner replied, 'Lord, Massa George, why didn't you speak?' and that the prisoner remained until morning, assisting to wash and lay out the deceased, and was arrested in the morning. There was other testimony, confirming said witness, and showing that said party went to watch Capt. Hanby's house in disguise by consent and agreement with him. There was testimony tending to show, also, that some person had been seen by night about said premises, while Capt. Hanby was absent in camp drilling his company; that on the night before the killing, the prisoner had taken the gun, in presence of his mistress, and run out some distance from the house, and shot (as he said) at some person. It was in proof, also, that the prisoner, on

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the morning before the killing, asked his mistress for the gun, to carry to the field; that she refused, and forbade his having or taking the gun; and that he took the gun from the house, on the night of the killing, without the knowledge or consent of his master or mistress, and during the absence of the white family from home.

"The prisoner asked the court to charge the jury as follows: 'If the jury believe, from the evidence, that the deceased disguised himself, by blacking himself, and the manner in which he was clothed, for the purpose of deceiving the prisoner, and making him believe that he was a runaway slave; and, under such disguise, went to the prisoner's house on his master's premises, at an unusual hour of the night, between midnight and day; and there, by his disguised condition, and the manner in which he acted, deceived the prisoner; and that the prisoner, in truth and in fact, believed that the deceased was a runaway negro slave, and, under that delusion, shot and killed the deceased,—then he is neither guilty of murder, nor of the voluntary manslaughter of a white person, nor of the involuntary manslaughter of a white person in the commission of an unlawful act.' The court refused this charge, and the prisoner excepted.

"The court charged the jury, that the counts in the indictment included the charge of involuntary manslaughter; to which charge, also, the prisoner excepted."

The verdict of the jury was, "Guilty of voluntary manslaughter, as charged in the second count of the indictment."

E. W. PECK, for the prisoner.—By the criminal law, a man may safely act upon appearances; and if he acts in good faith, their falsity does not in any manner increase his guilt or criminality.—*Meredith v. Commonwealth*, 18 B. Monroe, 49; *Shorter v. People*, 2 Comstock, 197. This principle is, in substance, recognized in *Oliver's case*, (17 Ala. 587,) and in *Carroll's case*, (23 Ala. 28.) The act itself does not make a man guilty: to constitute a crime, the act and intent must both concur.—*Broom's*

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Legal Maxims, 211, 212, 221; 7 Term Rep. 514; Hale's P. C. 509. "If a man, intending to kill a thief, or a housebreaker, in his own house, happen by mistake to kill one of his own family, it cannot be imputed to him as a crime."—3 Cro. Rep. 588.

In this case, there was no malice of the will—no corrupt intent on the part of the prisoner. In the absence of his master and mistress, he was left at home the guardian and protector of their house and property. Danger of mischief was justly apprehended, some unknown person, supposed to be a runaway slave, having been seen prowling about at night. The deceased and his party disguised themselves as runaway slaves, and, by their conduct, induced the prisoner to believe that they were in fact what they assumed to be. Acting on this belief, the prisoner committed no crime in attempting to protect his master's house and property. If his act was not strictly lawful, it was at least excusable. As to the degree of caution which must be exercised, where a homicide is committed under an honest mistake of fact, see Foster's Crown Cases, 262–65.

2. The affirmative charge of the court is erroneous.

M. A. BALDWIN, Attorney-General, *contra*.—1. The charge asked by the prisoner, asserts three distinct propositions, each of which is untenable; namely, that the prisoner, on the facts supposed, would not be guilty of any one of the three specified offenses—murder, the voluntary manslaughter of a white person, or the involuntary manslaughter of a white person in the commission of an unlawful act. As murder, when committed by a slave, whether by killing a white person or a negro, is precisely the same offense, and subject to the same punishment, the first proposition is manifestly erroneous. As the prisoner was guilty of an unlawful act in having the gun, (Code, § 1012,) as well as in shooting it, he was at least guilty of the involuntary manslaughter of a white person in the commission of an unlawful act; to constitute which offense, a knowledge of the *status* of the per-

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son slain is not a necessary ingredient; consequently, the last proposition asserted by the charge is also erroneous. Whether the prisoner was guilty of voluntary manslaughter, or the voluntary manslaughter of a white person, depended upon other facts than those hypothetically stated in the charge, and was to be determined by a consideration of all the facts in the case. Although, to constitute a crime, an evil act and an evil intent must both concur; yet a man may intend to commit one wrong, and, failing in it, commit another; in which case, the wrong intended and the wrong done coalesce and create the crime.—1 Bishop on Criminal Law, 254; Wharton, § 965. The mere fact that the prisoner believed the deceased to be a runaway slave, would afford him no protection, if he had the means of ascertaining the true facts, and did not do so.—1 Bishop's Crim. L. 242; Wharton, § 1005; Barnes v. State, 19 Conn. 398; Commonwealth v. Marsh, 7 Metcalf, 472; United States v. Liddle, 2 Wash. C. C. 205; United States v. Ortega, 4 Wash. C. C. 530; United States v. Benners, 1 Baldwin's C. C. 240.

2. The affirmative charge of the court is sustained by the decision in Henry's case, 33 Ala. 389.

A. J. WALKER, C. J.—[Feb. 1, 1862.]—The charge asked by the prisoner, and refused by the court, involves the assertion, that the prisoner could not be guilty of murder, because the homicide was committed under the delusion that the deceased was a runaway slave, and that delusion was justified by the attendant circumstances. In so far as the charge involves that assertion, it was obviously wrong. A homicide, committed by a slave, under such circumstances as would constitute murder, would be the same offense, and subject to the same punishment, whether the deceased was a white person or a negro; and it could make no difference, in that case, that the prisoner supposed the deceased to be a slave.—Code, § 3312.

The charge, however, was designed to assert, that a slave, slaying a white person, under the delusion and be-

lief, justified by the circumstances, that the person killed was a runaway negro, would not be guilty of the voluntary manslaughter of a white person, nor of the involuntary manslaughter of a white person in the commission of an unlawful act; although, if the appearances had been true, he would have been guilty of the voluntary or involuntary manslaughter of a slave. This proposition is important, because a higher grade of punishment is prescribed, where those offenses are perpetrated by a slave upon a white person, than is prescribed where they are perpetrated upon a negro.—Code, §§ 8318, 8314. To support the proposition, it is asserted as a correct principle, that the guilt of a party of any particular offense is to be determined in the light of the circumstances as they appeared to him; and that, therefore, the prisoner cannot be guilty of the manslaughter of a white man, because it falsely appeared to him that the object slain was not a white man. We do not concede the principle so asserted, in the latitude in which it is thus stated. It stands opposed to the doctrine which authorizes a conviction of one offense, when the accused committed it, while designing and endeavoring to perpetrate another.

The true doctrine, as we conceive, is, that "where a party, without fault or carelessness, is misled concerning facts, and acts as he would be justified in doing if the facts were what he believes them to be, he is legally, as he is morally, innocent."—1 Bishop's Cr. Law, § 242. The charge asked and refused is at war with this principle; for it assumes that, no matter what the degree of guilt which would have existed if the appearance that the person slain was a negro had been true, the accused can not be guilty of the homicide, in any of its degrees, of a white person. The effect of it is, that although the accused would have been guilty of the murder or manslaughter of a negro, if the appearances had been true, he cannot be guilty of the murder or manslaughter of a white man, the appearances being false. The inevitable result of this doctrine would be, that the accused, although guilty of murder or manslaughter, could not be

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convicted of any offense. He could not be convicted of killing a negro, because in fact he killed a white man; and he could not be convicted of killing a white person, because the appearances superinduced and justified the belief that he was killing a negro.

It is not indispensable to the constitution of a crime, that the prisoner should commit the very act intended. Certainly, there must concur a wrongful intent, and a wrongful act. But he who, aiming to accomplish one wrongful act, fails in that, but perpetrates another, is not excused. The wrongful intent, and the wrongful act, are said to coalesce and make the crime.—Bishop on Cr. Law, § 254. Numerous illustrations of this doctrine are to be found in the books. Where there is a design to commit a felony, and a homicide ensues, against or beyond the intent of the party, he is guilty of murder; but, if the intent went no further than to commit a bare trespass, it will be manslaughter.—1 East's Cr. Law, 255. If A gives a poisoned apple to B, intending to poison B; and B, ignorant of it, gives it to a child, who takes it and dies, A is guilty of the murder of the child, but B is guiltless. And so, if one, out of malice at A, shoots at him, but misses him, and kills B, it is no less murder than if he had killed the person intended.—Wharton's Cr. Law, § 965. These illustrations will suffice to show, that to the conviction of a slave for the homicide of a white man, it is not indispensable that there should exist an intent to kill a white person, or even a knowledge that the deceased was a white man. Indeed, one may be guilty of involuntary manslaughter, where there was no intent to kill. A homicide, resulting from an attempt to commit any unlawful act, would be manslaughter; and therefore, if a slave should shoot unlawfully at a beast, and by chance kill a white person, he would be guilty of the involuntary manslaughter of a white person in the commission of an unlawful act, although he might be ignorant of the proximity of the person slain. Surely, the crime could not be less, if the purpose was to kill a negro instead of a beast; and yet such is the conclusion to which the ar-

gument for the prisoner would lead. The statute does not make a knowledge that the deceased was a white person an ingredient of the offense, and we cannot decide that it is. There being a criminal intent, the defendant is guilty, notwithstanding he was mistaken as to the person upon whom his unlawful purpose fell.—See the authorities collected in 1 Bishop on Cr. Law, § 247, and on the attorney-general's brief.

The 15th of Lord Bacon's maxims is as follows: "*In criminalibus, sufficit generalis malitia intentionis, cum facto paris gradus.*"—3 Bacon's Works, 238; Broom's Legal Maxims, 238. In reference to this maxim, the learned author says: "All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which, though it be not the fact, at which the intention of the malefactor leveled, yet the law giveth him no advantage of that error, if another particular ensue of as high a nature." We do not find this maxim so recognized by subsequent writers on the criminal law, and by those adjudging criminal causes, as to induce us without hesitation to adopt it as a correct exposition. The explanation of the maxim would seem to imply, that, to constitute the crime, it is only necessary that the act should be of as high a nature as the intent; and not to imply a denial that the crime might take its complexion from an act of criminality higher than the intent. If this be the construction, it would not aid the accused. If the maxim import that there must be a perfect correspondence between the intent and the act, it can not be harmonized with principles too well established to be controverted. A homicide, not intended, but committed, in the perpetration of burglary or arson, would be murder, notwithstanding the offenses intended are not, in our law, of as high a grade, or subject to as severe penalties, as murder. We shall not engage in any speculation as to the true import and operation, or the authority, of the maxim, but shall content ourselves with announcing the conclusion, that we can not be led by it to

oppose the proposition which we now proceed to state, as follows:

A slave, who kills a white man, intending to kill a negro, is guilty of a criminal homicide in the degree in which he would have been guilty if the person slain had been a negro; and he is subject to the punishment prescribed for the commission of the offense upon a white person. The maxim, in its literal translation, only requires, that the act should be of equal grade with the intent; not that the same punishment should be incident to the thing done as to the thing intended. Crimes may be of the same degree, and yet subjected by law, founded in public policy, to different punishments. The manslaughter of a white man by a slave, and the manslaughter of a negro by a slave, belong to the same degree of homicide, and yet are subjected to variant punishments. So, also, manslaughter committed with a bowie-knife, and manslaughter committed with a different weapon; are offenses of the same degree, and yet there is a distinction made in the punishments prescribed. Numerous other illustrations might be drawn from our criminal law. In all those cases, as in this, the difference is not in the degree, but in the punishment; and the difference in the punishment is the result of some incident to the crime, which from public policy the law makes an aggravation. If, therefore, we take the maxim in its literal import, we find nothing inconsistent with our position.

In the case of *Bob v. The State*, (29 Ala. 20,) it was argued, that the prisoner, a slave, when committing an assault and battery upon another slave, by accident struck and killed the deceased, who was a white person. In reference to that aspect of the case, this court said: "We hold, that if a slave, in the attempt unjustifiably to commit an assault, or assault and battery, on another slave, kill a white person by misadventure, he is guilty of involuntary manslaughter, under section 3312 of the Code." This is an express adjudication of the point made in this case, that a slave can not be guilty of the manslaughter of a white person, when the intent was aimed at a negro.

If one intending to beat a negro, and unintentionally killing a white person, is guilty of the homicide of a white person; *a fortiori*, is a slave thus guilty, when, intending to kill a negro, he by mistake kills a white person.

[2.] We are content to abide by the decision in Henry's case, 88 Ala. 889. Upon the principle of that decision, the accused might be convicted of the involuntary manslaughter of a white person, under a count for the voluntary manslaughter of a white person. There was, therefore, no error in the charge given by the court.

The judgment of the court below is affirmed, and its sentence must be executed, as therein ordered.

THE STATE vs. LEE & NORTON.

[APPLICATION TO COMMISSIONERS' COURT FOR CORRECTION OF TAX ASSESSMENT.]

1. *Tax on auction sales.*—The tax imposed by law on the gross amount of auction sales, (Code, § 391, subd. 17,) is to be assessed against and paid by the auctioneer, and not by the owner of the property sold.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. NAT. COOK.

THE appellees in this case, who were licensed auctioneers in the city and county of Montgomery, applied to the commissioners' court of said county, at its April term, 1861, for an amendment and correction of the taxes assessed against them for the tax year ending on the 1st March, 1860; alleging in their petition, that, during said tax year, they had sold at auction in said city real estate belonging to divers persons, the proceeds of which sales amounted in the aggregate to \$43,742.50, and that the county assessor had assessed against them a

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tax of one per cent. on the gross amount of said sales; which tax, as they insisted, ought to have been assessed against the several owners of said real estate, who were shown to be resident citizens of said county. The commissioners' court held the assessment correct, and refused to make the proposed amendment; and the appellees then removed the proceedings, by *certiorari*, into the circuit court. The circuit court overruled a demurrer to the petition, reversed the judgment of the commissioners' court, and ordered the assessment to be amended as asked by the petitioners. Exceptions were reserved on the part of the State to these several rulings of the circuit court, and they are here assigned as error.

M. A. BALDWIN, Attorney-General, for the State.

JOHN A. ELMORE, *contra*.

STONE, J.—[Feb. 20, 1862.]—Section 891 of the Code declares, that "Taxes are to be assessed by the assessor in each county, on and from the following subjects, and at the following rates:" * * * Subd.

"17. On the gross amount of all auction sales made in or during the tax year preceding the assessment, except cargo sales of foreign imports, those made by executors, administrators and guardians, as such, by order of court, or under legal process, and under any deed, will or mortgage; on every hundred dollars, and at that rate, one dollar."

The present record raises the question, whether this tax of one per cent. is to be paid by the auctioneer, or by the owner of the property sold. We hold that the auctioneer is the party who must pay this tax, for the following reasons: Section 392 of the Code declares, that "All persons engaged in any business or pursuit, the receipts, sales, commissions of which, or capital employed, are subject to assessment under the preceding section, must keep correct accounts of the same for the tax year preceding such assessments, and exhibit the results of the same to the tax collector, verified by oath." We sup-

pose this is a verbal inaccuracy, and that the meaning is, that it shall be exhibited to the tax assessor. Thus construed, it would seem to contemplate that the subjects of taxation should be rendered in by the auctioneer. It is difficult to conceive why taxables should be rendered in by one person, and the assessments made against another. But section 410, subdivision 3, is still more explicit. It declares, that assessments are to be made "on all sales and purchases subject to taxation, to the person making the same or his agent, in the county in which such sales or purchases are made." In addition to these plain indications in the statutes, we can well conceive of a legislative policy which would select a resident auctioneer, rather than a possibly non-resident proprietor, from whom to collect the assessments on auction sales. This policy, we think, was carried into the legislation.

The judgment of the circuit court is reversed; and this court, proceeding to render such judgment as the circuit court should have rendered, doth hereby order and adjudge, that the petition of the appellees, Messrs. Lee & Norton, be dismissed, at their costs, in the circuit court and in this court.

KINNEY vs. THE STATE.

[INDICTMENT FOR DISTURBANCE OF RELIGIOUS WORSHIP.]

1. *What constitutes offense.*—To constitute an interruption or disturbance of "an assemblage of people met for religious worship," (Code, § 3257,) it is not necessary that the interruption or disturbance should be made during the progress of the religious services; if made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remain in the house, and before a reasonable time has elapsed for their dispersion, the offense is complete.

FROM the Circuit Court of Winston.

Tried before the Hon. WM. S. MUDD.

THE indictment in this case charged, that the prisoner "willfully interrupted or disturbed an assemblage of people met for religious worship, by noise, profane discourse, or rude or indecent behavior, at or near the place of worship." "On the trial," as the bill of exceptions states, "the prosecution adduced testimony tending to show that, within twelve months before the finding of the indictment, and in said county of Winston, the defendant willfully interrupted and disturbed an assemblage of people met for religious worship, by using profane language, cursing and swearing, and by loud noise and rude behavior, at or near the place of worship. The defendant proved, that, at the time of said interruption and disturbance as aforesaid, the religious services had been concluded, the preacher had dismissed the congregation, and the people were about to disperse, a small portion of them having gone into the yard, while the remainder were still in the house where the religious services were held. On this evidence, the defendant asked the court to instruct the jury, that, if they believed the evidence, they must find the defendant not guilty; which charge the court refused to give, and the defendant excepted to its refusal."

E. W. PARKER, for the prisoner.,

M. A. BALDWIN, Attorney-General, *contra*.

R. W. WALKER, J.—[Jan. 14, 1862.]—Section 3257 of the Code enacts, that "any person, who willfully interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse, rude or indecent behavior, or by any other act at or near the place of worship, must, on conviction, be fined not less than twenty or more than two hundred dollars, and may be imprisoned not more than six months."

In Tennessee, the statute on this subject provided, that "if any person shall interrupt a congregation assembled

for the purpose of worshipping the Deity, such person shall be dealt with as a rioter at common law." On the trial of an indictment founded on the act just cited, it was proved that, after the services were over, and the congregation had been dismissed, and begun to leave, some being still in the church, some in the churchyard, and others left for home, the defendant, with others, excited and disturbed the congregation, by cursing, swearing, fighting, &c., there then being present a good many ladies and gentlemen. Upon these facts, the defendants asked the court to charge, that if the worship had closed, and the congregation had been dismissed, and had begun to disperse, part having left the ground at the time the disturbance occurred, then defendants could not be convicted. This the court refused, but charged the jury, that if the worship had ceased, and the congregation had been dismissed, then, unless a reasonable time had elapsed for the dispersion of the congregation after such dismissal, the defendants would be guilty, if they did acts calculated to disturb those on the ground. On appeal to the supreme court, it was decided, that there was no error in the rulings of the circuit judge; the court holding, that the act not only protects from disturbance a congregation while actually engaged in worship, but extends its protection also to all congregations which had assembled for the purpose of worshipping; and that this protection continues, from the time the congregation so assembles, until it disperses and ceases to be a congregation.—Williams v. State, 3 Sneed, 313

This decision, which we readily adopt as a correct construction of our own statute, is precisely in point in the present case, and shows that the court did not err in refusing the charge asked by the defendant.

The language of the Virginia act on the same subject is: "If any person shall, on purpose, maliciously, or contemptuously, disquiet, or disturb any congregation assembled in any church, meeting-house, or other place of religious worship," &c. And it has been held in that State, that the statute is applicable, not only to disturbances made

while the religious services are progressing, but also to disturbances made while the congregation is assembled for worship, though it be at night, on a Methodist campground, after the services are over for the day, and the worshippers are retired to rest.—Commonwealth v. Jones, 8 Gratt. 624.

Judgment affirmed.

STONE, J., not sitting.

'CHEEK vs. THE STATE.

[INDICTMENT AGAINST OWNER FOR NEGLIGENT TREATMENT OF SLAVES.]

1. *Joinder of offenses in indictment.*—An indictment, which charges that the prisoner, being the owner of certain slaves, "did fail to provide them with a sufficiency of healthy food or necessary clothing, or to provide for them properly in sickness or old age," (Code, §§ 3297-98,) is not objectionable for duplicity, although a conviction might be had on proof of negligent treatment in any one of the specified particulars; nor does the joinder of the names of several slaves, in the same count, render it obnoxious to that objection, although a conviction might be had on proof of the negligent treatment of any one of them.
2. *Description of slaves in indictment.*—In such an indictment, slaves whose names are to the grand jurors unknown, may be thus described, if by the use of due diligence their names cannot be ascertained; but, if it is shown on the trial that, at the time the indictment was found, their names were in fact known, or could have been ascertained by due diligence, the defendant will be entitled to an acquittal as to them; yet proof of the single fact that their names were known at the time of the trial, without more, would not entitle him to an acquittal.
3. *Election by prosecution.*—Under such an indictment, charging the negligent treatment of several slaves, if it should appear on the trial that the offenses as to the several slaves were distinct, it would be the duty of the court to compel an election by the prosecution; yet, if all the slaves are on the same plantation, and the defendant's conduct towards all of them in the aggregate is relied on for a conviction, there is no ground for such compulsory election.

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4. *Opinion of witness as expert.*—A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave.
5. *Relevancy of evidence, as showing quantity of meat furnished to defendant's slaves.*—The indictment having been found in May, 1860, and the prosecution having proved that, in the year 1859, all the meat on the defendant's plantation was consumed by midsummer, and that meat was afterwards supplied to the plantation from his residence,—it is competent for the defendant to prove that, in December, 1858, (outside of the time covered by the indictment,) a specified number of hogs were killed on the plantation, the meat of which was kept there for the use of the slaves.

FROM the Circuit Court of Lowndes.

Tried before the Hon. JOHN K. HENRY.

THE indictment in this case was found at the May term, 1860, and contained but a single count, which was as follows: "The grand jurors of said county charge, that, before the finding of this indictment, Randall Cheek was the master, or person standing in that relation to certain slaves, to-wit, Bob, Anderson, and Mose, and divers others whose names are to the grand jurors aforesaid unknown, and, as such, did fail to provide them with a sufficiency of healthy food or necessary clothing, or to provide for them properly in sickness or old age." The defendant demurred to the indictment, but the causes of demurrer assigned are not stated in the record. The court overruled the demurrer, and he then pleaded not guilty.

On the trial, as appears from the bill of exceptions, the State introduced one Snelgrove as a witness, who was the overseer on the defendant's plantation in Lowndes county, from February, until October, 1859, and who testified, that among the slaves on said plantation was one named Mose, another named Anderson, and two named Bob,—one being called "Old Bob," and the other "Short Bob." "The State then proved, by said witness, the amount of food which was furnished to said Mose during the period of twelve months before the indictment was found, for the purpose of showing that he was not sufficiently fed;

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and the proof, as to Mose, tended to show this fact. The State then proposed to make the same proof as to Anderson and the two Bobs; to which the defendant objected, on the ground that the State had elected to proceed for the offense of not sufficiently feeding the slave Mose, and because the two Bobs were not sufficiently described in the indictment; which objections the court overruled, and admitted the evidence, and the defendant excepted." The court also allowed the prosecution, against the defendant's objection, to make the same proof in reference to the other slaves on the defendant's said plantation, not named in the indictment; and the defendant reserved an exception to the admission of this evidence.

The only evidence adduced by the prosecution, in reference to the manner in which the slaves were fed, was the testimony of said Snelgrove, who stated that, "while he was overseer on said plantation, said slaves were each allowed, by the direction of the defendant, only one quarter of a pound of bacon per day, and no other meat, and were not allowed any bacon at all on Sunday; that they were also allowed as much corn meal as they wanted, and, during the summer, a very few vegetables and roasting-ears, and about a pint of butter-milk per day, and sometimes a little butter." It was also shown that said Snelgrove, in addition to the time he was in the defendant's employment, had only served as an overseer about eight months during the year 1858. The court allowed him to testify, against the defendant's objection, "that one and a half pounds of bacon per week was not, in his opinion, sufficient for each of said slaves, with the other food furnished to them as above stated; and that less than three pounds, or three and a half, per week, was not a sufficient quantity of bacon for a plantation slave;" and to the admission of this evidence the defendant also reserved an exception. Snelgrove having testified, on the part of the State, "that all the meat on the defendant's plantation was consumed by midsummer, 1859, and that meat was afterwards carried there from the defendant's

house," the defendant offered to prove that, "in December, 1858, he had thirty-three hogs killed on said plantation, for the use of the plantation, and that the meat (the quantity of which was shown) was kept on the place." The court rejected this evidence, and the defendant excepted. After the evidence was closed, the defendant again asked the court to compel the State to elect for which one of the slaves named in the indictment it would proceed, and reserved an exception to the refusal of the court to compel such election.

BAINES & NESMITH, for the defendant.

M. A. BALDWIN, Attorney-General, *contra*.

A. J. WALKER, C. J.—[Jan. 21, 1862.]—The statute under which the indictment was framed, is as follows: "Any master, or other person standing towards the slave in that relation, who inflicts, or allows another to inflict on him, any cruel punishment, or fails to provide him with a sufficiency of healthy food or necessary clothing, or to provide for him properly in sickness or old age, or treats him in any other way with inhumanity, on conviction thereof, must be fined not less than twenty-five, or more than one thousand dollars." Four of the penal omissions mentioned in this statute are charged in one count. The allegations of those omissions are joined conjunctively; for to say of one, that he failed to do either of two or more things, implies a failure in all. Therefore, the statute which authorizes the charging, *in the alternative*, of offenses of the same character and subject to the same punishment, has no influence upon the propriety of the joinder in this case.—Code, § 3506. But, without the aid of any statute, charges of the different penal acts and failures mentioned in the section above copied may be joined in a single count. They are described in the same clause, and subjected to the same punishment. The statute, in stating several acts of kindred criminality, in the disjunctive, and prescribing a punishment for the commission of one or the other of

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them, is understood to condemn one offense, and to specify different modes of committing it. It has, therefore, been decided, that the joinder of the charge of the respective acts in the same count is rather a charge of the same offense in the various modes of its commission, or in the different grades of it, and that, therefore, the count is not obnoxious to the objection of duplicity. The accused may be convicted of either of the specified modes of offense.—*Stevens v. Commonwealth*, 6 Metcalf, 241; *Murphy v. State*, 6 Ala. 846; 1 Bishop on Cr. Law, 535; *Mooney v. State*, 8 Ala. 328; *Ben v. State*, 22 Ala. 9; *Ward v. State*, *ib.* 16; *Swallow v. State*, *ib.* 20; *State v. Slocum*, 8 Blackford, 815; *Regina v. Bowen*, 1 Car. & Kir. 501; *Iowa v. Abrahams*, 6 Iowa, (Clark,) 117; *Long v. State*, 12 Georgia, 298; *State v. Meyer*, 1 Spears, 305.

The indictment charges the commission of the offense in reference to three slaves designated by name, and divers others to the grand jurors unknown. The perpetration of the different species of offense specified in section 3297, upon any *one* slave, is indictable. That is made clear, alike by the language of that section, and of the next following section, which declares, that it shall "be sufficient to charge that the defendant did inflict on a slave any cruel punishment, or that he failed to provide him with a sufficiency of healthy food," &c. That two or more distinct offenses can not be joined in the same count, is a general rule of the law; but there are exceptions to it. One of these exceptions is, that the different offenses which are the result of the same act, and are parts of the same transaction, may be joined in the same count.—1 Archbold's Cr. Pl. 95-96. Practical illustrations of this exception are found in indictments for burglary and larceny after entering the house.—*Barbour's Cr. Law*, 310; Arch. Cr. L. 96. Then, whether or not the indictment in this case is obnoxious to the objection of duplicity, depends upon the question, whether the offenses as to the different slaves were parts of the same transaction, or the result of the same conduct on the part of the defendant. Duplicity is an objection which

must affirmatively appear from the indictment. It is not an objection to an indictment, that the offenses it charges may belong to distinct transactions. Does it, then, affirmatively appear in this case, that the distinct specifications of offense as to the different slaves were the result of distinct acts on the part of the accused? We think it does not. It is conceded, that the distinctness of the causes of offenses might appear from the nature of them. There are offenses which are incapable of a common origin. Such is not the character of the offenses alleged in this case. A planter may, by an order, or act, or omission, common in its effects, withhold from all his slaves a sufficiency of healthy food and necessary clothing, and from his sick and aged slaves a provision suitable to their respective conditions. Where this is the case, a joinder of the offenses, in reference to all the slaves coming within the operation of the common cause, is permissible. No hardship from such a joinder results to the accused; for his defense, like the charge, centres in a common point. Indeed, he derives an obvious advantage from the joinder, in meeting in a single count the accumulated charge of misconduct in reference to all the slaves affected, rather than incurring the vexation and peril of numerous separate prosecutions.—*State v. Johnson*, 3 Hill's Law (S. C.) R. 1. If it should be disclosed in the progress of the trial, that the offenses as to the different slaves were distinct, the court would, by compelling an election on the part of the State, protect the accused from the injury of being compelled to answer as to diverse transactions under the same count.—*People v. Adams*, 17 Wendell, 475; *Regina v. Bleasdale*, 2 Car. & Kir. 765.

We have looked into the books, and find the leading principle upon which we have proceeded supported by several decisions. In *Rex v. Benfield and Saunders*, (2 Burr. 980,) the court sustained a count which charged the singing in the street of songs libelous of the prosecutor, and of his son, and of his daughter. In *Regina v. Giddins and others*, (Car. & Marsh. 634,) the objection

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of duplicity was overruled, where a single count charged an assault upon George Pritchard and Henry Pritchard, and stealing from George Pritchard two shillings, and from Henry Pritchard one shilling and a hat, on a given day. It is said in 1 Hale's Pleas of the Crown, 501, that if one at the same time steals goods of A, of the value of sixpence, goods of B, of the value of sixpence, and goods of C, of the value of sixpence, being per chance in one bundle, or upon a table, or in one shop, this is grand larceny, because it is one entire felony. So, in Thomas' case, reported in 2 East's Cr. L. 934, a count was sustained, which alleged the uttering and publishing as true twenty-four false forged and counterfeited receipts for money.

In a still later case in England, the accused was charged with stealing coal from the mines of thirty-one different proprietors, which was brought up through a shaft leased by him; and the indictment was held not to be obnoxious to the objection of duplicity.—*Regina v. Bleasdale*, 2 Car. & Kir. 765. It appeared that the different larcenies had been committed by undermining from the defendant's shaft; and the court refused to compel the prosecutor to elect, and decided that, so long as the coal was gotten from one shaft, it was one continuous taking, though the working was carried on by different levels and cuttings, and into the lands of different people. The court, however, advised the prosecution to confine its attention to the taking from one owner.

In the case of the *People v. Adams*, (17 Wend. 475,) it was held, that an indictment, which alleged an illegal sale of different kinds of liquors, on a given day, to divers persons, was not bad for duplicity, and that it must be understood as averring only one transaction. The supreme court of Vermont sustained an indictment, which charged that the defendant broke and entered one man's house with intent to steal his goods, and, having so entered, stole another man's goods.—*State v. Brady*, 14 Verm. 353. The decision is put upon the ground, that the burglary and larceny, although to the detriment

of different persons, belonged to the same transaction, and might be joined in the same count. So, the supreme court of Rhode Island decided, that a criminal complaint of an assault on two persons was not bad, considering the assault on both the result of the same act.—*Kinney v. State*, 5 Rhode Isl. 385. And in *Commonwealth v. Williams*, (*Thacher's Cr. Cas.* 84,) it was held, that where goods, belonging to different persons, are stolen at one time and place, the offense may be set forth in one count. So, also, in this State, it has been decided, that a count which charged that the defendant administered poison to three persons, is not bad for duplicity.—*Ben v. State*, 22 Ala. 9. See, also, *Shaw v. State*, 18 Ala. 547; *Rasmek v. Commonwealth*, 2 Vir. Cas. 356. See, also, *Com. v. Tuck*, 20 Pick. 356.

We think the joinder in this case is authorized by the principle to be extracted from the cases above collected, and we decline to sustain the objection for duplicity.

[2.] It is further objected to the indictment, that it charges an omission of duty, not only as to three named slaves, (Bob, Anderson and Mose,) but *as to divers others, whose names were to the jurors unknown*. In the cases of *Francois v. State*, (20 Ala. 83,) *Brown v. Mayor of Mobile*, (23 *ib.* 722,) and *Starr v. State*, (25 *ib.* 38,) it was decided, that such a mode of averment was not permissible, where the offense was trading with slaves. The reason given for those decisions is, that the absence of the master's consent was an element of the offense, and that the accused could not be prepared to defend himself, by showing the necessary consent, unless he had information of the name of the slave with whom the alleged trading was done. In the first named of those cases, the court say: "If the trading with a slave was an offense, without any other constituent, we see no reason why the indictment might not allege his name as unknown to the jurors, if such was the fact, without in the slightest degree impairing the ability of the accused to defend." It is apparent, therefore, that those decisions lay down a rule applicable to a particular class of cases, and not a general

principle of criminal pleading. We think the general rule is, that where the names of third persons are unknown, and cannot be ascertained, they may be mentioned in the indictment as persons whose names are to the grand jurors unknown.—1 Chitty on Pleading, 212; 1 Arch. Cr. Pl. 80, 81, 82; Wharton's Am. Cr. Law, § 251. If it should appear that the name was in fact known when the indictment was found, or could have been ascertained by the use of due diligence, it seems that the defendant would, upon the trial, be entitled to an acquittal as to the slaves so improperly described as unknown.—See the authorities above. We must, for these reasons, hold the indictment on its face unobjectionable, because the names of some of the slaves are stated as unknown to the jurors.

It appears, however, that on the trial evidence was introduced, charging the accused as to slaves whose names were at that time known, but are not mentioned in the indictment. It is not shown, however, that the names of those slaves were not unknown, and incapable of ascertainment, at the time of the finding of the indictment. If they were unknown, and incapable of ascertainment, when the indictment was found, the defendant would not be entitled to an acquittal in reference to them, because their names were afterwards ascertained, and were known at the time of the trial.—Com. v. Hendire, 2 Gray, 503; Whar. Am. Cr. Law, § 251. The bill of exceptions is not inconsistent with the supposition, that the names were not discovered, and not capable of discovery, until after the indictment was found. We can predicate no ruling, in favor of the defendant, upon the isolated fact, that the names were known at the time of the trial. There was no error, under the facts disclosed, in allowing proof as to slaves not named in the indictment.

[3.] We think it results from what we have already said in passing upon the indictment, that the court was not bound to restrict the State to a prosecution for misconduct as to any one or more particular slaves, as it appears that all the slaves were on a single plantation, and the conduct of the accused as to the slaves on the plantation

aggregately was the evidence relied on for his conviction. The conduct of the accused as to the feeding of each slave seems to have been a part of one general transaction applicable alike to all. If, however, it had appeared on the trial, that the offenses as to the different slaves were distinct, it would have been the duty of the court to compel an election on the part of the prosecution, and thus protect the accused against being compelled to answer as to divers transactions under the same count.

[4.] The witness introduced by the State had been an overseer on plantations for sixteen months. When we consider the closeness of observation, which overseers on plantations are compelled to make, of the food consumed by slaves, and of their health and capacity to labor, we are constrained to regard one who has pursued that business for sixteen months as competent to give his opinion in reference to the amount of food which is sufficient for a plantation slave.—*City Council of Montgomery v. Gilmer & Taylor*, 33 Ala. 116; *Johnson v. State*, 35 Ala. 370; *McCreary v. Turk*, 29 Ala. 244.

[5.] It was shown that, about the middle of the summer of 1859, the meat on the defendant's plantation, where the slaves were kept, had been consumed, and that afterwards meat was supplied from defendant's residence. That proof being before the jury, the defendant proposed to show that, in December, 1858, a certain ascertained quantity of pork had been provided on the plantation, and kept on it. This evidence, which was rejected by the court, had, when taken with what had been previously proved, a manifest bearing upon the question of the amount of meat which the negroes had received and consumed; and the court erred in rejecting it. For this error, the judgment of the court below must be reversed.

We do not think it necessary for us to notice the other numerous questions of evidence presented by the bill of exceptions. Some of them are not very important, and the others may not arise again.

Reversed and remanded.

STONE, J., not sitting.

EX PARTE COBURN.

[APPLICATION FOR MANDAMUS TO PROBATE JUDGE.]

1. *Jurisdiction of probate judge to revise proceedings of magistrate under peace warrant.*—A probate judge has no jurisdiction, on *habeas corpus* or otherwise, to revise an order made by a justice of the peace, requiring a party to give security to keep the peace, and directing his imprisonment until such security is given: the only mode of revising the action of the justice, is by an appeal to the circuit court under section 3351 of the Code.

APPLICATION by Thomas S. and Edward Coburn for a *mandamus* to the probate judge of Lowndes county, requiring him to allow them to adduce evidence before him, on *habeas corpus*, showing the illegality of their confinement by the sheriff of said county, as hereinafter stated. The exhibits to the petitioners' application showed, that they were arrested, on the 17th December, 1861, under the warrant of a justice of the peace, issued on the complaint of one Jacob Bruce, charging them with a breach of the peace and other apprehended violence; that on the trial before the justice, he made an order, requiring them to give security to keep the peace, and directing their confinement by the sheriff until such security was given; that they then applied to the probate judge for the writ of *habeas corpus*, which was granted; that on the hearing of the *habeas corpus*, the sheriff returned the proceedings under which he held the petitioners in confinement; that the probate judge thereupon refused to examine into the validity of the proceedings had before the justice, and would not allow the petitioners to adduce evidence showing their innocence of the charge imputed to them; and that they reserved exceptions to the several rulings and decision of the probate judge.

• W. F. WITCHER, for the motion.

Ex parte-Coburn.

R. W. WALKER, J.—[Jan. 21, 1862.]—Where, on complaint to a justice of the peace, an order is made by him, requiring an individual to give security to keep the peace, and directing his imprisonment until such security is given; the probate judge has no authority, upon *habeas corpus* or otherwise, to re-examine the case upon the facts, and discharge the prisoner. The only mode of revising the decision of the justice upon the facts, is by an appeal, under section 3351 of the Code, to the circuit court, which can try the case *de novo*, and either confirm the order of the magistrate, or discharge the appellant. Code, § 3354; *Tomlin v. State*, 19 Ala. 9. The return of the sheriff showed, that the petitioners were held in custody under an order of a justice of the peace, requiring them to give security to keep the peace; and as this order was not open to objection on any of the grounds specified in section 3744 of the Code, the probate judge had no authority to inquire into its legality or justice.—Code, § 3741; *Ex parte Burnett*, 30 Ala. 461. Consequently, the probate judge was right, in refusing to hear evidence touching the guilt or innocence of the petitioners, and properly dismissed the petition.

Motion refused.

STONE, J., not sitting.

GREENE vs. MCGHEE.

[APPLICATION BY SHERIFF FOR MANDAMUS AGAINST COMPTROLLER.]

1. *Compensation of sheriff for conveying convicts to penitentiary.*—In conveying a convict to the penitentiary, it is the duty of the sheriff to travel "the land route usually traveled" within this State, (Code, § 3931;) and he has no authority to carry him through other States, although "the land route usually traveled," between the court-house of the county and the penitentiary, may be through those States.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

THE appellee in this case, who was the sheriff of Lawrence county, applied to the circuit court for a *mandamus* to William J. Greene, the comptroller of public accounts, to compel that officer to draw his warrant on the State treasurer, in favor of the petitioner, for the amount claimed by him as compensation for conveying a convict to the penitentiary. The amount claimed by the petitioner was \$338 44; the distance from Moulton, the county-site of Lawrence, to the penitentiary, being estimated at nine hundred and fifty miles, by way of the railroad through Chattanooga, Tennessee, and Atlanta, Georgia, to Montgomery. The comptroller refused to draw his warrant on the treasurer for more than \$156 75, insisting that the petitioner claimed for traveling a greater distance than the law authorized. In the circuit court, the defendant admitted all the facts stated in the petition, "except that the distance between Moulton and the penitentiary, by the land route usually traveled, was nine hundred and fifty miles;" consented that that fact should be determined by the court, upon evidence to be adduced, and waived a rule *nisi*. "Thereupon, the petitioner introduced three witnesses, who stated, that they knew the land route usually traveled from Moulton to the peniten-

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tiary; that the land route usually traveled, for the last three years, has been by way of the railroad to Chattanooga, Tennessee, thence by railroad to Atlanta, Georgia, thence to Montgomery, and thence to Wetumpka by land; and that the distance by that route, going and returning, is more than nine hundred and fifty miles. Said witnesses further stated, that there was a nearer land route through the State of Alabama, which was not direct, and which was sometimes, but very seldom, traveled, and was not the land route usually traveled." On this evidence, the circuit court awarded a *mandamus*; and its judgment is now assigned as error.

M. A. BALDWIN, Attorney-General, for the appellant.
SAMUEL F. RICE, *contra*.

A. J. WALKER, C. J.—[Jan. 28, 1861.]—The law of this State allows to sheriffs compensation for the removal of convicts to the penitentiary, at a specified rate for every twenty miles of the distance to the penitentiary and back, by "the land route usually traveled."—Code, § 3931. The land route usually traveled, from Moulton, the county-site of Lawrence county, is upon the line of railroad passing through a portion of Tennessee and Georgia; and the appellee, being the sheriff of Lawrence county, claims compensation according to the distance upon that route; there being, also, another land route, exclusively within the State of Alabama, which is sometimes traveled. The question of this case is, whether he is entitled to compensation according to the usually traveled land route, which thus passes through two other States, or according to the route by land within the State of Alabama.

Certainly, if the section of the Code above referred to is enforced according to its literal import, the appellee would be entitled to compensation for the distance upon the route through Tennessee and Georgia. But "the literal interpretation of an act is not always that which either reason or the law approves."—*Thompson v. State*, 20 Ala. 54. In the construction of statutes, we are not

to adhere to the letter, at the expense of the true meaning and intent of the legislature.—Smith on Stat. 658, § 510. It is proper that the purpose of the legislature, and the subject-matter of the enactment, should be considered, that, if possible, such a construction should not be adopted, as would lead to absurd or grossly unjust consequences; that the intention should be hunted through the entire act; that effect should be given to all its parts, and that all acts upon the same subject should be construed in *pari materia*.—Smith's Com. on Statutes, §§ 518, 550, 574, 576; Sedgwick on Stat. and Con. Law, 238.

The main purpose of the article in the Code, in which section 3931 is found, is to provide for the safe removal of convicted felons to the penitentiary. This purpose is patent in almost all the sections of the article; and the different sections are framed in reference to each other, so as to provide every conceivable safeguard for the safe delivery of the convicts at the penitentiary. If the sheriff may convey the prisoners into other States on the route, the purpose so clearly indicated, and for the accomplishment of which such careful provision is made, may be utterly frustrated. This results from the fact, that the authority of the sheriff to execute the sentence of the court is necessarily confined to the jurisdiction of this State. The question of the effect of a criminal sentence, when presented in the judicial tribunals of a sister State, has been several times discussed by the courts in this country, and the conclusions attained are not altogether harmonious.—Story on Conflict of Laws, § 621; Commonwealth v. Green, 17 Mass. 515; Chase v. Blodgett, 10 N. H. 22. It is not necessary for us to enter upon that subject. Whether a penal sentence does or does not fall within the provision of the constitution of the United States, which declares, that "full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State," is an immaterial inquiry here; for, however that may be, it is certain that a sheriff of the State of Alabama can have no authority to

go outside of the limits of the State, in the execution of a judicial sentence. His authority must necessarily cease when he leaves the jurisdiction of the State of Alabama, whether that authority be to execute a judgment in a civil case, or the sentence in a criminal case. If the statute under consideration should be allowed the operation contended for on the part of the appellee, we should convict the legislature of the absurdity of consulting especially for the safe removal of convicts to the penitentiary, and yet authorizing the sheriff to carry them where his authority would cease. The argument already made is fortified by reference to other sections of the article devoted to the subject of the removal of prisoners to the penitentiary. Section 3924 gives to the sheriff, in the contingency of the disability of any of his guards to discharge their duties, the power to summon new guards "in any county through which he may pass." Section 3926 also gives him authority to summon additional guards, when it is rendered necessary by an attempt to rescue the convict, or other unforeseen danger; and section 3927 makes it a misdemeanor, for any person, under fifty years of age, to refuse, without a good excuse, to obey the summons of him as a guard by the sheriff. Section 3928 places the guards under the control of the sheriff, and makes disobedience of his directions, in relation to the safe conveyance of the prisoner, a misdemeanor. Section 3929 exempts the officers and guards attending the prisoner from arrest, except for felony and breach of the peace. Section 3936 makes it the duty of jailors to receive and keep prisoners on their way to the penitentiary; and, lastly, section 3937 makes it an indictable offense, for the prisoner to escape, or attempt to escape. All these provisions, which are to be considered along with the section fixing the sheriff's compensation, and are really to be treated as parts of the same act with that section, indicate most clearly the intention that a convict, in the process of removal to the penitentiary, should be kept within the State; and they become utterly ineffective and inoperative, as soon as he is carried out of

the State. The sheriff could not summon guards in another State; persons so summoned could not be indictable, under an Alabama statute, for a failure to obey; neither the guards refusing to obey the sheriff's directions in another State, nor the convict attempting to escape in another, could be amenable to the criminal laws of Alabama; the qualified exemption of the sheriff and his guards from arrest could not be effectual beyond the limits of the State, and the sheriff could not avail himself of the jails in another State. The provisions of the Code upon that subject cannot be allowed their proper operation, if the sheriff is permitted to convey convicts to the penitentiary through other States; and the rules of construction, which we laid down at the outset of this opinion, require us to decide, that the sheriff has no authority to carry a prisoner through another State, and is not entitled to compensation for the increase of distance in consequence of his doing so, although he may go upon the usually traveled route. The land route usually traveled, over which he must pass, is the route within the State usually traveled.

It is urged against the foregoing construction of the statute, that the sheriff is required to make affidavit of the number of miles on "the land route usually traveled;" that there may arise cases, in which there is no *usually* traveled land route within the State; and that, in those cases, the sheriff would be unable to make the prescribed affidavit. It is probable that there are court-houses in the State, from which there is no route to the penitentiary which is *usually* traveled through its entirety, or over which persons are accustomed to pass from the court-house to the penitentiary, in a continuous travel; and it may be, that there is no usual continuous travel from the court-house of Lawrence county to the penitentiary, along any road within the State. But we cannot think that, in such cases, it was the intention of the legislature to exclude the sheriff from any compensation. In such cases, a route leading to the penitentiary, and the different parts of which are usually traveled, and which is in

a reasonably direct course from point to point, is, within the meaning of the law, the land route usually traveled.

The judgment of the court below is reversed, and a judgment must be here rendered dismissing the petition; and the appellee must pay the costs of this court, and of the court below.

R. W. WALKER, J., not sitting.

KING AND WIFE vs. AVERY.

[BILL IN EQUITY FOR DIVISION AND ACCOUNT OF SLAVES.]

1. *Amendment of bill.*—Under the act of Feb. 8, 1853, "amendatory of proceedings in chancery," (Session Acts, 1857-8, p. 230,) any amendment of a bill, either as to parties or averments, which may become necessary to meet the justice of the case, or to meet any state of the proof that will authorize relief, must be allowed by the chancellor, upon such terms as he may deem just and equitable; but the statute does not authorize the allowance of an amendment, which would convert the bill of the wife into the bill of the husband, and enables him to assert a claim barred by the statute of limitations.
2. *Statute of limitations to amended bill.*—If a bill is filed, by mistake, in the name of the wife as a feme sole, to recover her interest in slaves which accrued to her before her marriage, and which vested in the husband by virtue of his marital rights; and an amended bill is afterwards filed, in the name of husband and wife, after the statute of limitations has barred the husband's right of action,—the statute is a bar to the relief sought, although the statutory bar was not complete when the original bill of the wife was filed.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THIS is the same case which is reported in 28 Ala. 267, under the title of *Hair, adm'r &c., v. Avery, et al.* The original bill was filed in January, 1852, by James

Hair, as the administrator of Mildred Walker, deceased, and Etherlin T. Croxton, against Bryant Avery and Pinkney Jones; and sought a division and account of certain slaves, which had been bequeathed by John Hill, the maternal grandfather of the said Mildred and Etherlin, to his daughter, Mildred Walker, (the mother of said Mildred and Etherlin,) and her children, and which were claimed and held by the defendants under purchases at execution sale against the husband of said Mildred Walker. The chancellor sustained a demurrer to the bill, for want of equity; but his decree was reversed by this court, at its January term, 1856, and the cause was remanded.—See 28 Ala. 267.

On the 30th May, 1857, a bill of revivor was filed, in the names of M. V. Lacy, as the administrator *de bonis non* of said Mildred Walker, and James King, and Etherlin T. King, his wife; alleging, that Hair had resigned, and Lacy had succeeded him, as administrator of said Mildred, and that said Etherlin T. had married said James King after the filing of the original bill. Answers were filed to this bill, by both of the defendants, on the 24th June, 1857. On the 30th June, 1858, (two days after an order had passed for the publication of the testimony,) the bill of revivor was dismissed, on motion of the complainants therein; and on a subsequent day of the same term, on the affidavit of the complainants' solicitor, stating that he did not, at the time of filing the original bill, know the fact that said Etherlin T. was then married to said James King, the chancellor granted leave to the complainants to amend the original bill, by making it the bill of said King and wife alone; and the bill was amended accordingly. The defendants answered the amended bill, and, among other defenses, pleaded the statute of limitations of six years. On final hearing, on pleadings and proof, the chancellor held, that the amendment ought not to have been allowed, as it made an entirely new case; and that the statute of limitations was a complete bar to the relief sought by the bill as amended. He therefore dismissed the bill; and his decree is now assigned as error.

TURNER REAVIS, for appellants.—1. The amendment was properly allowed. —Session Acts, 1857–8, p. 280, § 3; *Blackwell v. Blackwell*, 33 Ala. 57. All amendments, properly allowed, take effect, so far as the equity of the bill is concerned, as of the date of the original bill.—*Blackwell v. Blackwell*, 33 Ala. 57; *Cain v. Gimon*, 36 Ala. 168; 1 Dan. Ch. Pr. 455, and cases cited. It must, then, necessarily follow, that if the statute of limitations had not effected a bar when the original bill was filed it cannot avail as a defense to the amended bill; as in analogous cases at law, where the statute is held not available as a bar to an amended complaint, if the action was commenced before the bar was perfected, because the amendment relates back to the commencement of the suit.—*Agee v. Williams*, 30 Ala. 636; *Bradford v. Edwards*, 32 Ala. 623.

2. If James King had died, after the filing of the original bill, but before the filing of the amended bill, Mrs. King certainly might have amended her bill, by stating her marriage and the death of her husband, without letting in the defense of the statute of limitations. The cause of action was the wife's; her husband could not have maintained a suit to recover it, without joining her as a co-plaintiff with him; and if he had died before recovering it, it would have survived to her. In such case, if the statute of limitations does not bar the wife, it can neither be allowed against the husband alone, nor against both. *Merrit v. Doss*, 31 Miss. (2 George,) 275; *Wood v. Riker*, 1 Page, 616; *Black v. Whittall*, 1 Stockton, (N. J.) 572; *Williams v. Lanier*, Busbee's (N. C.) Law R. 80.

E. W. PECK, *contra*.—1. The statute of limitations had effected a bar as to James King, before the passage of the act of 1858, under which the amendment was at first allowed; and the amendment cannot, in view of that fact, be said to "meet the justice of the case." Moreover, the amendment ought not to have been allowed, because it made an entirely new case, founded on a new title.—*Rogers v. Atkinson*, 14 Geo. 822. The amended

bill must be regarded as the suit of the husband alone, being founded on his title, and seeking to recover the property for him; and the decree therein rendered would not, in any future litigation, be binding on the wife.—9 Paige, 247, and cases cited; Story's Eq. Pl. § 61.

2. Where new matter is brought forward by amendment, which will affect the opposite party prejudicially, the amendment will not have relation back to the filing of the original bill, but will only be considered as pending from the time it was actually filed.—Story's Eq. Pl. § 904; Mitford's Pl. 380; McDougald v. Dougherty, 11 Geo. 594; Holmes v. Trout, 1 McLean, 1; 7 Peters, 214; Miller v. McIntyre, 6 Peters, 64; Woodward v. Ware, 37 Maine, 563; Dudley v. Pierce's Administrator, 10 B. Monroe, 88.

STONE, J.—[Jan. 29, 1861.]—The 3d section of the act "amendatory of the proceedings in chancery," (Pamph. Acts of 1857-58, p. 280,) declares, "that amendments to bills and answers shall be allowed, at any time before final decree, to meet the justice of the case; and amendments to bills shall be allowed, by adding or striking out new parties complainant or defendant, and to meet any state of proof that shall authorize relief," &c. The terms of this statute are very analogous to several of the most important provisions of the Code, in relation to amendments in suits at law.—Code, §§ 2403-4. We think the same liberal rules of intendment should be applied to the two statutes. Under this statute, we hold, that any change of parties, or of averment, which may become necessary *to meet the justice of the case, or to meet any state of the proof that will authorize relief*, must be allowed, "upon such terms as the chancellor shall deem just and equitable." If the state of the proof authorizes relief, the chancellor has no discretion in the *matter of allowing* the amendment. In the *terms* upon which the amendment will be allowed, he has a discretion.

In the present case, the amendment should have been allowed, if the state of the proof authorized relief. The

objection to its allowance is, that the proposed amendment made a new case—that when the amendment was allowed, the statute had barred the right therein asserted; and that; as to this new matter, or new case, the rule is, that the statute continues to run, not only to the time of filing the original bill, but up to the time when the amendment was allowed.

[2.] We think the rule must be regarded as settled by the authorities, that “if, during the pendency of a suit, any new matter or claim, not before asserted, is set up and relied upon by the complainant, the defendant has a right to insist upon the benefit of the statute, until the time that the new claim is presented; because, until that time, there was no *lis pendens*, as to that matter, between the parties.” On the contrary, if the amendment set up no new matter or claim, but simply vary the allegations as to a subject already in issue, then the statute will run only to the filing of the original bill.—*Dudley v. Price*, 10 B. Mon. 84–88; *Story's Equity Pl.* § 904; *Holmes v. Moreland*, 1 McL. 1; S. C., 7 Pet. 171; *Miller v. McIntyre*, 6 Pet. 61; *Woodward v. Ware*, 37 Maine, 563; *Bradford v. Edwards*, 32 Ala. 528.

We think the chancellor obtained a correct conclusion in this case. Although, in the suit by Mr. and Mrs. King, the right to recover depended on the title of Mrs. King under her grandfather, Mr. Hill; still the suit, in its present form, must be regarded as the suit of Mr. King, the husband. The authorities so treat it, and go even so far as to hold, that a failure to recover in such suit would be no bar to a subsequent suit by Mrs. King. Further, if Mr. King had died pending the suit, and Mrs. King had suffered the suit to abate, taking no steps after his death, a decree for costs could not have been rendered against her.—*Sto. Eq. Pl.* §§ 61, 361; *Grant v. Van Schoonhoven*, 9 Paige, 255; *Hughes v. Evans*, 1 Sim. & Stu. 185; *Reeves v. Dudley*, 2 Sim. & Stu. 464; *Owden v. Campbell*, 8 Sim. 551; *Wake v. Packer*, 2 Keene, 69; *England v. Downs*, 1 Beav. 96.

Although in a suit by Mrs. King while sole, as well as

in the present suit, the right to recover depends mainly on her title; still the two cases are entirely different, in this: In a suit by her alone, the litigation would be entirely her's, and the money her's, if she succeeded; in the present suit, the right to recover depends also on a new derivative title, viz., the marital rights of Mr. King, acquired by his marriage with the female complainant. If, on a proper issue, there was a failure to prove the marriage, this suit must fail, although Mrs. King's title may be perfect. If this bill succeed, the fruits of the recovery will vest in Mr. King. The suit by Mrs. Croxton was in her own right. The present is Mr. King's suit, in which Mrs. King incurs no costs or disabilities, and in which, if there be no change of parties, she can realize no benefit.—*Dudley v. Price, supra; Thrasher v. Ingram, 82 Ala. 645.*

The decree of the chancellor is affirmed.

ROBERTS AND WIFE vs. OGBOURNE.

[BILL IN EQUITY FOR RECOVERY OF SLAVES, ACCOUNT, &c.]

1. *Bequest to "heirs of the body" construed to vest in children as purchasers.*—Where the testator devised and bequeathed his entire estate, both real and personal, to his wife during life or widowhood, and directed that, on her death or marriage, his real estate should be sold, and all his property be divided into seven equal parts, "*and then disposed of as follows—to the heirs of the body of Sarah B. [his daughter] one part, she, the said Sarah, to have the use and benefit thereof during her life, but not to sell or dispose thereof;*" &c.; and it appeared that Sarah B. was married, and had children living at the time the will was made, and that the testator, in another clause of his will, bequeathed a specific sum in money to her directly, in the event that he did not make an advancement of equal amount to her during his life,—*held*, that the children of Sarah B., who were living at the death of the testator's widow, took as purchasers under the bequest, and that the rule in *Shelley's case* did not apply. (STONE, J., dissenting.)

Roberts and Wife v. Ogbourne.

APPEAL from the Chancery Court at Montgomery.
Heard before the Hon. WADE KEYES.

THE material facts of this case, as alleged in the bill, may be thus stated: John Breedlove died in Montgomery county, in 1883, having first made and published his last will and testament, which was duly admitted to probate after his death, and which contained the following provisions: The first clause directed the payment of all his debts. The second clause was a devise and bequest to his wife, Mrs. Nancy Breedlove, of his entire estate, both real and personal, during her widowhood. The third, fourth and fifth clauses contained bequests of ten dollars each to three of his children, to whom he had already made advancements. The sixth clause, after reciting partial advancements, of different amounts, already made to Sarah Bledsoe, Frances Bledsoe, Elizabeth Bledsoe, Martha Eubanks, and Lewis P. Breedlove, (his children,) and his intention to make further advancements to them, added, "But, if I should not make such advancements during my life, then it is my will and desire, that my wife should do so after my death, in the order in which they are named, out of the proceeds of the crop, or profits of the estate, (after maintaining the family, and paying all expenses,) at such times, and in such manner, as she may judge most fit and expedient; but, if neither myself nor my wife should make such advancements, then, after the death of my wife, I give and devise the balance of such sums not then already advanced be paid out of my estate." The seventh clause directed all his real estate to be sold to the best advantage, at the death or second marriage of his widow. The eighth clause was in these words: "At the death or intermarriage of my wife, I direct, will and devise, that all my estate, both real and personal, after paying the foregoing bequests, be divided, if she die, into seven equal parts,—if she marry, into eight equal parts, she taking one part,—and then disposed of as follows: to the heirs of the body of Sarah Bledsoe, one part, she, the said Sarah, to have the use and benefit

thereof during her life, but not to sell or dispose thereof; to Lewis P. Bledsoe, one part; to the heirs of the body of Frances Bledsoe, one part, she, the said Frances, to have the use and benefit thereof during her life, but not to sell or dispose thereof; to the heirs of the body of Elizabeth Bledsoe, one part also, the said Elizabeth to have the use and benefit thereof during her life, but not to sell or dispose thereof; to the heirs of the body of Martha Eubanks, one part, she, the said Martha, to have the use and benefit thereof during her life, but not to sell or dispose thereof; to Joseph M. Breedlove, one part; and to Benjamin F. Breedlove, one part."

Mrs. Sarah Bledsoe was a daughter of the testator, and was, at the time the will was executed, the wife of William Bledsoe, and then had one or more children living. Mrs. Nancy Breedlove, the widow, and William Bledsoe, qualified as executors of the testator's will. Mrs. Breedlove died in the year 1836, having never married a second time; and William Bledsoe thenceforward acted as sole executor, and obtained from the orphans' court orders for the distribution of the estate, under which all the property was distributed, except one share which he retained, in right of his wife. Mrs. Sarah Bledsoe died in April, 1838, leaving several children surviving, the eldest of whom, Sarah H., married Young A. Roberts in October, 1847, being then seventeen or eighteen years of age. Anne, another daughter of Mrs. Bledsoe, married A. B. Vickers; and she and Mrs. Roberts were the only children who were living when the bill in this case was filed. William Bledsoe died in October, 1855, and Robert H. Foxhall duly qualified as his executor.

In August, 1856, Roberts and wife filed their bill in chancery, against said Foxhall, as executor, and Vickers and wife; claiming one-half of the property which William Bledsoe had retained, and praying an account and general relief. Foxhall having died pending the suit, the cause was revived against Wm. H. Ogbourne, as the succeeding personal representative of William Bledsoe.

The chancellor sustained a demurrer to the bill, for want of equity; and his decree is here assigned as error.

CHILTON & GUNTER, and E. M. KERR, for the appellants.—The bequest is in direct terms to “the heirs of the body of Sarah Bledsoe,” who had children living at the time of the execution of the will. Her children answer the description in the bequest, and take as purchasers under it. The same clause of the will shows, that no such expression is used when a bequest is made to the testator’s sons, and that it is several times used when he is providing for his daughters; and another clause shows, that the daughters themselves had already received advancements, and were to receive more. The intention being clear that the children should take as purchasers, that intention must prevail.—*Shepherd v. Nabors*, 6 Ala. 681; *Dunn v. Davis*, 12 Ala. 185; *Ellis v. Ellis*, 15 Ala. 296; *Hodgson v. Ambrose*, Doug. 327; 9 Ala. 716.

The rule in *Shelley’s* case has no application, because the estates of the ancestor and heirs are not of the same quality; Mrs. Bledsoe’s interest being a mere equitable use for life, while her children take the legal estate.—2 *Jarman on Wills*, 244; 2 *Story’s Equity*, § 845 *a*; 8 *Paige*, 152; 2 *Paige*, 122. In cases of bequests of personal property, the rule in *Shelley’s* case is only applied to effectuate the intention, and not on grounds of public policy, as in devises of realty. If the subject of the bequest were realty, the words used would not be sufficient to create a freehold estate in Sarah Bledsoe. The whole property is given to “the heirs of the body,” and the time of enjoyment by them postponed; not the whole given to the ancestor for life, with remainder to “the heirs of her body.” Moreover, the whole bequest is an executory trust, to which the rule in *Shelley’s* case never has been applied.—1 *White & Tudor’s Leading Cases in Equity*, 17; 2 *Jarman on Wills*, 253; 2 *Kelly*, 307; 3 *ib.* 559.

WATTS, JUDGE & JACKSON, *contra*.—"Heirs of the body," in their technical sense, are words of limitation, and not words of purchase; and there is nothing in the will to explain or limit their meaning, or to show that they were used in any other than their technical sense. The clause can have no other legal meaning, than if it was in these words: "To Sarah Bledsoe one part during her life, and at her death to the heirs of her body; she, the said Sarah, to have no right to sell or dispose of the same." If this were the language, the children of Sarah Bledsoe could not, under our decisions, take as purchasers from the testator.—Ewing v. Standefer, 18 Ala. 400; Hamner v. Smith, 22 Ala. 488; Machen v. Machen, 15 Ala. 373; Snodgrass v. Landman, 26 Ala. 593, and authorities cited in these several cases; also, Keyes on Chattels, §§ 246-50. The clause prohibiting Sarah Bledsoe from selling or disposing of her share, is void.—Keyes on Chattels, §§ 181-183. William Bledsoe having reduced the property to possession during coverture, his marital rights attached, and it became his absolute property.

R. W. WALKER, J.—[March 9, 1861.]—In its technical sense, the term "heirs of the body" includes all persons who successively answer the description of heir of the body; and hence it embraces the whole line of lineal descendants, to the most remote generation. Technically construed, the expression is one which cannot be used to describe the children or grandchildren of a living person, for "*nemo est hæres viventis*." That the term, as used in this will, cannot be understood in this technical sense, is plain; because the testator directs the estate to vest, during the life-time of Sarah Bledsoe, in the "heirs of the body" of Sarah Bledsoe. That this was the intention of the testator, seems too clear for doubt. On the death of the widow, the property is to be divided into seven equal parts, "and *then* disposed of as follows." To what time does *then* here refer? Obviously to the period of division, the death of Mrs. Breedlove. Next we have the manner in which these seven parts are to be *then* dis-

posed of—"to the heirs of the body of Sarah Bledsoe, one part." If the testator had stopped there, there would be no room to doubt that the will would have operated a complete gift of that one part, to take effect at that time, in favor of the persons answering the description of heirs of the body of Sarah Bledsoe. The words which follow simply postpone the enjoyment of the property by the legatees during the life-time of Mrs. Bledsoe, by reserving to her the use and benefit of the same during that time. The qualification attached to Mrs. Bledsoe's use of the property, "not to sell or dispose thereof," (whether valid or not,) is at least indicative of the intention of the testator to give only a *use*, and not a property or *estate* in the *corpus* of the legacy. The heirs do not take on the death of Sarah Bledsoe, but they then come into the enjoyment of that which they took on the division made during her life-time. The term "heirs of the body" is, therefore, used to describe persons who take an interest before the death of Mrs. Bledsoe; and hence the persons answering that description take, not as her heirs, but directly from the testator, as purchasers under the will.

Mr. Fearne says, that when the words "heirs," &c., "operate only to give the estate imported by them to the heirs described originally, and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase."—Fearne Rem. 79, 194.

The attempt to bring this case within the rule in Shelley's case—erroneously so called, when applied to personality—cannot succeed, without transposing and omitting words found in the will, and adding others not used by the testator. The proposition is, that the clause as it stands is the same in effect as if it read thus—"To Sarah Bledsoe during her life-time one part, but not to sell or dispose thereof, and after her death to the heirs of her body." This is not what the testator has said. He gives the one part to the heirs of the body of Sarah Bledsoe, reserving to her simply a *use* during her life-time; and this use he studiously seeks to distinguish from a prop-

erty in the *corpus*, by denying to her the right to sell or dispose of it. The words found in the will give to the "heirs of the body," &c., the entire property in the *corpus* of the legacy; simply postponing the time of its enjoyment, in order that Mrs. Bledsoe may have the temporary use. The words as transposed, and added to, give to Mrs. Bledsoe the property in the *corpus* during her life, with *remainder* to the heirs of her body. In the clause as it stands, the idea of a *remainder* is studiously excluded, while in that proposed as a substitute, it is the controlling and fundamental idea. In the will as it was written by the testator, while the use of the property is secured to Mrs. Bledsoe, this use is clearly separated from the title to the *corpus* of the property, which vests at the time of the division in the persons designated as the heirs of the body of Sarah Bledsoe. These heirs take the entire property, not a remainder after a life-estate; and the reservation in favor of Mrs. Bledsoe is not of the thing itself, but of the use and benefit for a specified time. In this respect, the case is distinguishable from all those which have been held to fall within the rule in Shelley's case.—See *Shepherd v. Nabors*, 6 Ala. 631; *Keyes' Chattels*, § 359 (a), § 202; 2 *Story's Eq.* § 845 (a); *Wilks v. Greer*, 14 Ala. 437-442; *Golding v. Golding*, 24 Ala. 125.

It is to be borne in mind, that by the seventh clause of his will, the testator directs that, on the death or intermarriage of his widow, all his real estate shall be sold to the best advantage; and the language of the succeeding clause must be construed with reference to this provision. Although there is no express allegation to that effect, yet it is to be presumed that the executor sold the land as directed, on the death of Mrs. Breedlove; and the exhibit attached to the bill seems to confirm this presumption. At all events, the words of the will must be construed as if his directions had been obeyed. Land ordered to be sold is regarded as money for every purpose necessary to effectuate the intent of the testator.

In *Clark v. Clark*, (8 Paige, 152,) it was held, that the

bequest of the use of the residue of the testator's personal estate (which was directed to be sold), for the life of the legatee, or for any shorter period, does not entitle such legatee to the possession of the fund. The executor should retain the fund in his own hands, and pay over the income thereof to the legatee as it accrues; and if the executor suffers the capital to go into the hands of such legatee, to enable him to collect the income himself, he must take sufficient security from the legatee to insure the return of such capital.—See, also, *Lovenhoven v. Shuler*, 2 Paige, 122.

This court has held, that the proper practice in the chancery court, in such cases, is to give the legatee for life the option of taking the money upon his executing a suitable bond, and, in case of his failure to do so, then to order the money to be let out on loan, and the interest collected annually, and paid over to him.—*Mason v. Pate*, 34 Ala. 392.

But, if we were to concede that Mrs. Bledsoe took a technical life-estate, not a mere usufructuary interest; still the rule would not apply, if the remainder is to vest during her life, in certain persons described as the "heirs of her body;" for that fact would negative the idea, that these words were to be construed in their technical sense. Wherever these words are used as "*descriptio personarum*," and not as comprehending the whole line of descendants in infinitum, they are words of purchase, not of limitation, and the rule in *Shelley's* case has no application.

Mr. Fearne says, that the inquiry, in reference to the application of the rule in *Shelley's* case, is reducible to two simple questions, viz.: "Is the limitation to the heirs, &c., so calculated and directed, that the person claiming under it must entitle himself merely under the description of heir of the species denoted by the words in their technical sense? And if so, is there anything to restrain the same words from equally extending to and comprehending all other persons successively answering the same description, or from entitling them alike under it, and *eo nomine*?" A negative answer to either branch of

this inquiry seems to exclude the application of the rule." *Fearne Rem.* 199.

We have already expressed the opinion, that the words "heirs of the body" were here used as descriptive of particular persons, who were to take an interest under the will during the life of their ancestor, and not as embracing all other persons who might successively answer the description of "heir of the body of Sarah Bledsoe," understanding that expression in its technical sense. This being so, both branches of the inquiry proposed by Mr. Fearne must be answered in the negative.

The view we have taken derives support from the fact, that Sarah Bledsoe had children living at the date of the will, who might take under it, if we understand the words in their popular, not in their technical sense; that Mrs. Bledsoe had received advancements from her father during his life-time, and that he made a further separate provision for her by his will; that she was at the time a married woman, and that her father must be presumed to have known that a gift to his daughter would enure to the benefit of the husband, to the exclusion of her children.

Our conclusion is, that the terms "heirs of the body of Sarah Bledsoe," were intended as descriptive of the children of Sarah Bledsoe who might be living at the time appointed for the division of the property, namely, the death of the testator's widow; that the persons thus described take from the testator directly, as purchasers, and not through Mrs. Bledsoe in succession, as her heirs. Hence the rule in Shelley's case has nothing to do with the case.—See *Woodley v. Findlay*, 9 Ala. 720; *Dunn v. Davis*, 12 Ala. 135; *Powell v. Glenn*, 21 Ala. 466; *Durden v. Burns*, 6 Ala. 368; *Dudley v. Porter*, 16 Ga. 618; *Hodgson v. Bussey*, 2 Atk. 89; *Keyes' Chatt.* § 102.

Decree reversed, and cause remanded.

STONE, J.—I am not able to agree with either the reasoning or conclusions of the majority of the court, as expressed in their opinion. I have found no case, and I apprehend none can be found, which agrees with this in

its facts, and which asserts that heirs of the body take as purchasers. In *Baldwin v. Carver*, (1 Cowp. 318,) Lord Mansfield said, "The rule of law most undoubtedly is, that a devise to the heirs general or special of a man alive, is void." In the same case, which in its principles is not distinguishable from this, save in the feature that there was in that case an attempted bequest over of the personalty if the life-tenant died without heirs or issue, that same learned judge remarked, "It strikes me, as at present advised, that the subsequent limitation of the personalty is too remote."

There is a rule, well defined and sensible, that "where a bequest is to children or grandchildren *generally*, payable at a certain time, or at the happening of an event, then all who fill the description and are *in esse* at the time, or at the happening of the event, take." The spirit and sense of this rule, I apprehend, lie in the following two principles: 1st, there is a policy of the law to so construe the language of the testator, as to let in the largest possible number of beneficiaries; and, 2d, when, by the terms of the bequest, the property becomes necessarily divisible—namely, by the occurrence of the time, or the happening of the event specified, then the door must be closed against after-beneficiaries, or the result would be to make the distributive portions unequal; which would defeat the express intention of the testator. These rules, thus expounded, lend no support to the opinion of the majority, because the will contains no provision for the division of the property among the heirs of Sarah Bledsoe. On the contrary, such property could not properly be divided among the heirs, during the life-time of Sarah Bledsoe.

A further argument: The rule invoked has no pertinence in determining whether the words "heirs of the body" designate a class of persons who take as purchasers, or are words of limitation, defining the quantum of estate in the first taker. It only obtains between persons, whose right to take as purchasers is shown by the terms of the instrument. The present will contains none of the words

which impart to the phrase *heirs of the body* the more definite import of children.

The will of Mr. Breedlove gives a vested legacy to the "heirs of the body of Sarah Bledsoe," or it gives them nothing. It was postponed in enjoyment until the death, first of testator's widow, Mrs. Breedlove, and afterwards until the death of Sarah Bledsoe. The division of the estate, directed to take place at the death of Mrs. Breedlove, was not for the purpose of ascertaining the particular share that should go to each *heir* of Sarah Bledsoe's body, but to define the sum out of which the heirs could claim partition at the death of their mother, Sarah Bledsoe. This, then, created no necessity for closing the door against after-born children. In my opinion, the legal questions in this case stand precisely as they would stand, if the testator had himself perfected the division of his estate, to take effect at the death of testator's widow, and had bequeathed certain named property then to go "to the heirs of Sarah Bledsoe,—she, the said Sarah, to have the use and benefit thereof during her life, but not to sell or dispose thereof." Thus construed, no one would contend, that the particular class of heirs of Mrs. Bledsoe's body, who should be in life at the death of Mrs. Breedlove, would take as purchasers, to the exclusion of after-born children.

An argument may be supposed to be predicable on the collocation of the language of the bequest. The clause first gives the property to *the heirs* of Sarah Bledsoe, and then reserves a life-estate to Mrs. Bledsoe. I am not able to perceive any force in this argument. The law regards the substance, rather than the form of things. The substance of this bequest is, that Mrs. Bledsoe was to have the use and benefit of this property during her life, but not to sell or dispose thereof; and at her death, the property to go to the heirs of her body.—See *Leech v. Cooley*, 6 Sm. & M. 98. Thus understood, no one would contend, that *the heirs* would be purchasers.—See *Britton v. Swinney*, 3 Mer. 116; *Bradley v. Peixoto*, 3 Ves. Jr. 324; *Simmonds v. Simmonds*, 8 Sim. 22; *Elton v. Eason*,

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19 Ves. 73; Moore v. Brooks, 12 Grat. 135; Kay v. Conner, 8 Humph. 633; Hooe v. Hooe, 13 Grat. 245; Ewing v. Standefer, 18 Ala. 400; Machen v. Machen, 15 Ala. 873; 1 Roper on Legacies, 46 *et seq.*; Elmore v. Mustin, 28 Ala. 309; 11 Geo. 67.

Holding that the term *heirs of the body*, as found in this will, is no more definite than it would be if it followed the creation of the life-estate in Mrs. Bledsoe, I cannot regard the present complainant as a purchaser.

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[DETINUS FOR SLAVES.]

1. *Probate of foreign will; necessity for.*—A foreign will must be proved to have been admitted to probate, before a certified copy of it can be received as evidence of title to personal property, or become admissible evidence under the act of congress of 1790.
2. *Judicial notice of courts.*—The courts of this State will take judicial notice of the facts, that the proceedings of courts of ordinary in a sister State, under the constitutional and statutory provisions in evidence in this case, are lamentably loose, and that their records are made up with peculiar carelessness; and will therefore, in construing the records of those courts, adopt such a construction of the language as will be most favorable to the maintenance and regularity of their proceedings, without supplying what is absolutely wanting.
3. *Probate of foreign will; sufficiency and proof of.*—A transcript from the records of a court of ordinary, in Georgia, properly certified under the act of congress of 1790; containing a copy of a will, an affidavit beneath it by one of the subscribing witnesses, purporting to have been made before "J. Thigpen, J. P.," to the effect "that he believes he *assigned* his name at the last part of the within instrument of writing;" followed by an entry, stating that B. S. and J. S. were "sworn executors;" and other entries, showing that the persons so appointed discharged several executorial duties, and were recognized by the court as executors,—must, under the constitution and laws of that State, as proved in this case, be

regarded as showing the probate of the will, and the appointment and qualification of the executors.

4. *Presumption of probate from lapse of time.*—Authorities cited on the question, whether the probate of a will, nearly sixty years old, would be presumed from lapse of time, under the circumstances of this case.
5. *Redundant evidence.*—Where the probate of a will is shown by a transcript from the records of the proper court, duly certified, other parts of the transcript, containing entries relating to the testator's estate, which can have no other effect than to strengthen the conclusion that the will was admitted to probate, are merely redundant evidence; and their admission as evidence is, at most, error without injury.
6. *Admissions against interest.*—The declarations of a person who has the possession of slaves, to the effect "that they had been loaned to him by the widow of S., and were held under the will of S., to be returned at her death, to be divided as directed by said will," are competent evidence against a sub-purchaser from him by subsequent contract; so also are his declarations, "that there was a dispute about the title, and he would only sell such title as he got from the sheriff, as he was informed that the heirs of S. would claim them at the death of his widow."
7. *Amendment of complaint.*—A complaint may be amended, (Code, § 2403,) by striking out the name of one of the plaintiffs, who was dead at the commencement of the suit.
8. *Motion to suppress depositions taken before amendment of complaint.* The fact that the complaint is amended, after depositions have been taken, by striking out the name of one of the plaintiffs, who was dead at the commencement of the suit, is not a sufficient ground for the suppression of such depositions.
9. *Bequest of estate for life, with remainder over; uncertainty; remoteness.*—"I will and bequeath to my beloved wife Elizabeth one negro woman, named Jane, to her her life-time; then she, and all her increase from the date '97, to be equally divided among the five children, if living at that time; if not, to their heirs lawfully begotten of their body; if none such heirs, to be equally divided among themselves when the youngest child comes of age; and after my wife's life-time, the wench to be hired to support her children; if her labor will not support her children, they must all help her, as they are to reap the property; and my desire is, that the children should be kept together, and schooled upon the hire of the negroes, until they come of age to demand them—the boys at twenty-one, the girls at sixteen years of age; and till then, the hire to go to the support of all the children, both black and white. My desire is, that if any of the children should die before it comes of age, they all should have his legacy equally divided

among them; and if any one of the negroes dies, they all shall make him equal with themselves." *Held*, that this bequest was not void for uncertainty, but created a life-estate in the widow, with remainder over to such of the testator's five children as might then be living, and the lineal descendants, then in existence, of those who were dead; and that the limitation in favor of such lineal descendants was not void for remoteness.

APPEAL from the Circuit Court of Sumter.

Tried before the Hon. WILLIAM S. MUDD.

THIS action was brought by James B. Smith and others, who were the children, grandchildren, and great-grandchildren of Sion Smith, deceased, against William H. Jemison; and was commenced on the 12th April, 1857. The defendant pleaded—1st, the general issue; 2d, the statute of limitation of six years. The plaintiffs claimed the slaves in controversy, under a clause in the will of their ancestor, said Sion Smith, deceased, which was in the following words: "I will and bequeath to my beloved wife, Elizabeth Smith, one negro woman named Jane, to her her life-time; then she, and all her increase from the date ninety-seven, to be equally divided among the five children, if living at that time; if not, to their heirs *lawfull* begotten of their body; if none such heirs, to be equally divided *it* among themselves when the youngest child comes of age; and after my wife's life-time, the wench to be hired to support her children; if her labor will not support her children, they all must help her, as they are to reap the property; and my desire is, that the children should be kept together, and schooled upon the hire of the negroes, *it* they come of age to demand them—the boys at twenty-one, the girls at sixteen years of age; and *ill* then, the hire to go to the support of all the children, both black and white. My desire is, that if *ary* one of the children should die before it comes of age, that they all should have his legacy equally divided among them; and if *ary* one of the negroes dies, they all shall make him equal with themselves." The slaves in controversy were the descendants of the woman

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Jane, mentioned in the above-copied clause of Sion Smith's will; were brought to this State in 1825, by one A. M. Griffin, who had married one of the testator's granddaughters; were sold under execution against said Griffin, and were bought at the sheriff's sale by Claiborne Griffin, who, about the year 1840, sold them to the defendant, at less than their full value. The testator's widow died in May, 1851.

At the May term, 1858, (Hon. A. A. COLEMAN presiding,) the plaintiffs asked leave to amend their complaint, by striking out the name of John Jordan, one of the plaintiffs, who was proved, by the depositions then on file, to have been dead at the commencement of the suit; and the court allowed the amendment, against the defendant's objection; to which a bill of exceptions was reserved by the defendant.

At the November term, 1858, when the cause was called for trial, the defendant moved to suppress the depositions which had been taken by the plaintiffs before the complaint was amended, as above stated, because they were taken before the said amendment was made. The court overruled the motion, and allowed the depositions to be read; to which the defendant excepted.

On the trial, the plaintiffs offered in evidence a transcript from the records of the court of ordinary of Washington county, Georgia, properly certified under the act of congress of 1790, and containing—1st, a copy of the will of Sion Smith, deceased, which was dated the 14th July, 1798, and to which the names of Frederick Cooper and Elizabeth Smith purported to be subscribed as attesting witnesses; 2d, an affidavit, of which the following is a copy:

"State of Georgia, } Frederick Cooper, being du-
Washington county. } ly sworn, saith, that he believes
that he *assigned* his name to the last part of the within
instrument of writing. "FREDERICK COOPER."

"Sworn to, before me, this 21st day }
of March, 1799. J. Thigpen, J. P." }

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Beneath this certificate was an entry, or memorandum, in these words: "Britton Smith, Jordan Smith, sworn executors." The transcript also contained a "copy of the bill of appraisement on the estate of Sion Smith, deceased," which was dated the 12th August, 1799, and purported to be "certified" by three "sworn appraisers;" a "copy of the bill of the sale on the estate of Sion Smith," dated November, 1799, and purporting to be "certified by Britton Smith and Jordan Smith, executors;" a "copy of second inventory and appraisement," dated the 27th December, 1799, and purporting to be "certified and sworn to, 8th January, 1800," by Jordan Smith, before "T. Watts, cl'k;" an affidavit by Elizabeth Smith and Frederick Cooper, taken by a justice of the peace, on the 8th August, 1799, to the effect that they, "having been removed by the inferior court of the county and State aforesaid from their administration on the estate of Sion Smith, deceased," "have resigned into the hands of Britton Smith and Jordan Smith, who were established executors to the last will and testament of said Sion Smith," all the property in their hands belonging to said estate; a receipt, dated the 8th August, 1799, and purporting to be given by Britton Smith and Jordan Smith, "executors to said estate," for the property delivered to them by Elizabeth Smith and Frederick Cooper; and several entries, purporting to show the annual income and expenditure of said estate, and to be sworn to by Jordan Smith, before a justice of the peace, in the following form:

"Book A, page 37.

"Dec. 3, 1802. The income of Sion Smith's estate, the hire of four slaves, amounting to..	\$232 87
Expenditures of Sion Smith's estate, amounting to.....	109 93

Services excepted.

JORDAN SMITH, Ex'r."

"The justness of the above sworn to, }
this 7th December, 1803, before me. }
I. Irwin, J. P."

The defendant objected to the reading of this entire transcript, as a whole; and also to that part which purported to be a copy of the will of Sion Smith, and to the remaining portions, separately. The court overruled each of the objections, and allowed the transcript to be read; to which exceptions were reserved by the defendant.

During the further progress of the trial, the court allowed the plaintiffs to prove, against the defendant's objection, "that A. M. Griffin, while he was in possession of the slaves Judy and her children, said, that they had been loaned to him by Sion Smith's widow, and were held under Sion Smith's will, to be returned at her death, to be divided as directed by said will;" also, "that Claiborne Griffin, while he was in possession of said slaves, said, that there was a dispute about the title, and he would only sell such a title as he got from the sheriff, as he was informed that the heirs of Sion Smith would claim them at the death of his widow." To the admission of these declarations exceptions were reserved by the defendant.

The plaintiffs read in evidence the constitution and several statutes of the State of Georgia, relating to the organization and jurisdiction of courts of ordinary, and abolishing estates-tail, and the case of *Jordan v. Cameron*, reported in 12 Geo. Rep. 267; and the defendant read in evidence the case of *Gray v. Gray*, reported in 20 Geo. Rep. 804; all of which are made parts of the bill of exceptions. The case of *Jordan v. Cameron* was a bill in chancery, filed by the heirs, assignees, and legal representatives of Sion Smith's five children, in 1852, to recover certain slaves, who were alleged to be the descendants of the woman Jane; in which the court held, that the will of Sion Smith, being more than fifty years old, "was admissible as an ancient paper," although the probate was defective. In the case of *Gray v. Gray*, the following points were decided: 1. In Georgia, it was the early policy to abolish the English law of entails and descents, so far as it tended to preserve, undivided, landed estates in families. 2. A bequest of personal property,

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which would create an estate-tail under the English statute *de donis*, vests an absolute, unqualified, fee-simple estate in the first taker. 8. The construction of the statute *de donis* must be determined by the English decisions. 4. Under a bequest of slaves to the testator's two daughters Jane and Sarah, to be equally divided between them; "and should the said Jane and Sarah, or either of them, die without an heir begotten of their bodies, then their part or parts to be equally divided between Polly Morrison, my said sons, and the survivor," the limitation over is void for remoteness.

The court charged the jury as follows:

"1. That if they should find for the plaintiffs, the plaintiffs would be entitled to recover reasonable hire from the death of Sion Smith's widow, as shown by the proof.

"2. That the bequest of Jane and her increase, in the will of Sion Smith, to his widow and children and the heirs of their bodies, was not void for uncertainty.

"3. That the provisions of said will, under which the plaintiffs, as children, grandchildren, and great-grandchildren of Sion Smith, claim in this action, are not void under the laws of Georgia in evidence; and the said grandchildren and great-grandchildren can take under said will.

"4. That if they believed all the evidence before them, they had a right to presume that the said will was properly admitted to probate; and if they so believed and presumed, the copies before them were evidence of said will, to the same effect that the original would be."

The defendant excepted to each of these charges; and he now assigns them as error, together with all the other rulings of the court to which he reserved exceptions.

TURNER REAVIS, for appellant.—1. Section 2403 of the Code does not apply to a case in which one of several plaintiffs is dead at the commencement of the suit. Such a suit is a nullity, or, at least, is subject to be dismissed when the fact is brought to the notice of the court.

Terms cannot be imposed on a dead man, nor can he be compelled to pay costs.

2. The depositions taken before the complaint was amended, ought to have been suppressed, because the amendment effected a substantial change of parties — Horback v. Knox, 6 Barr, 377. In the cases cited to this point for the appellee, the amendment worked no change of parties.

3. The transcript from the records of the court of ordinary in Georgia, containing what purported to be a copy of the will of Sion Smith, ought not to have been admitted. It does not show that the proof of the will was taken by the court; nor that the probate of it was granted by the court; nor that it was ordered by the court to be recorded; nor that letters testamentary were granted by the court; nor that any executorial bond was given; nor that any settlement by the executor was acted on by the court; nor, in fact, that any action of the judicial mind was had on any of the matters therein contained. All the proceedings appear to have been *ex-parte*, and all the affidavits to have been made before a justice of the peace. Under the constitution and statutes of Georgia, which were read in evidence, courts of ordinary are courts of limited and special jurisdiction; consequently, the record must affirmatively show the facts necessary to sustain the jurisdiction.—*McCartney v. Calhoun*, 11 Ala. 110; *Steen v. Steen*, 25 Miss. 530; *Gunn v. Howell*, 27 Ala. 663; *Wyatt v. Rambo*, 29 Ala. 510; *Lamar v. Commissioners' Court*, 21 Ala. 772; *Commissioners' Court v. Thompson*, 18 Ala. 694. In *Jordan v. Cameron*, 12 Geo. 267, the demurrer admitted, "that the will was proved and admitted to record in the court of ordinary, and that letters testamentary were issued thereon;" and yet the court expressly say, that the will was not properly admitted to record, and was admissible only as an ancient paper.

4. If the will was not probated, the paper purporting to be a copy ought not to have been received for any purpose. The rule authorizing a will, more than thirty

years old, to be read in evidence as an ancient document, without proof of probate, applies only to wills devising real estate; which, in England, where the rule originated, pass the title to real estate, without probate; but a will of personalty cannot be received as evidence of title, until it has been probated. The rule applies, moreover, only where the original paper is produced, or a sufficient predicate is laid for the introduction of secondary evidence.—*Mitchell v. Mitchell*, 3 S. & P. 33.

5. The declarations of A. M. Griffin were not explanatory of his possession, and were clearly inadmissible.—*Allen v. Prater*, 30 Ala. 458; *Brice v. Lide*, 30 Ala. 647; *Perry v. Graham*, 18 Ala. 822; *McBride v. Thompson*, 8 Ala. 650; *Abney v. Kingsland*, 10 Ala. 355.

6. The declarations of Claiborne Griffin were mere hearsay, and were equally inadmissible.

7. The defendant, being in lawful possession of the slaves, was not liable for hire from the death of the tenant for life, but only from the time a demand was made, or from the commencement of the suit.—*Brock v. Headon*, 13 Ala. 370; *Vaughn v. Wood*, 5 Ala. 304; *Lawson v. Lay*, 24 Ala. 184.

8. The bequest, under which the plaintiffs claim, is void for uncertainty. No sensible construction can be placed upon the words, which will harmonize all parts of the clause. The heirs of the body, it declares, take nothing, unless all the five children be dead at the death of the mother; and if they all be dead, and there be "none such heirs," the negroes are "to be equally divided among themselves." In the following cases, although the language was not more ambiguous or uncertain than in this case, the bequest was held void for uncertainty: *Hoffman v. Hankey*, 8 My. & K. 376; *Newton v. Richards*, 2 Beavan, 112; *Mohun v. Mohun*, 1 Swanst. 301; *Abraham v. Alman*, 1 Russell, 509; *Bayeaux v. Beaux*, 8 Paige, 333.

9. The will attempts to create an estate-tail, or a limitation over which is too remote; both of which are void in Georgia, where the will was made.—*Gray v. Gray*, 20 Geo. 808; *Marbury & Crawford's Digest*, 220, § 5.

GEO. G. LYON, *contra*.—1. Section 2403 of the Code authorizes an amendment of the complaint, by striking out the name of a dead plaintiff, equally with a living plaintiff; and no inconvenience can result from such an amendment.

2. The motion to suppress the depositions was properly overruled.—Agee v. Williams, 30 Ala. 636; Goldsmith, Forcheimer & Co. v. Picard, 27 Ala. 142.

3. The transcript was properly certified under the act of congress, and was competent evidence. That the copy of the will was properly admitted, see 11 Ala. 721; 8 Ala. 390; 24 Ala. 260; 6 Humph. 501; 10 Sm. & Mar. 78; 2 U. S. Digest, 234, §§ 643-45.

4. The declarations of A. M. Griffin and Claiborne Griffin were made while they were respectively in possession of the negroes, and were in disparagement of their title; consequently, those declarations were admissible evidence against the defendant, who claimed under said Griffins.—19 Ala. 722; 27 Ala. 458, 528, 651; 28 Ala. 552, 236; 29 Ala. 174, 188, 457.

5. As to the correctness of the first charge given by the court, see 12 Ala. 185; 23 Ala. 377; 21 Ala. 151; Story on Bailments, § 414.

6. As to the correctness of the second charge, see 21 Ala. 459; 23 Ala. 818; 25 Ala. 292.

7. As to the correctness of the third charge, see same cases; also, 18 Ala. 149; 17 Ala. 62; 7 Ala. 246; 2 Jar. on Wills, 51, note 1; 3 Porter, 452.

8. As to the correctness of the fourth charge, see Gantt's Adm'r v. Phillips, 23 Ala. 275, and cases there cited.

A. J. WALKER, C. J.—[Feb. 12, 1861.]—If the will of Sion Smith was not admitted to probate, it follows, that it cannot be read as evidence of title to personal property, and that a copy of it cannot be certified, so as to become evidence under the act of congress of 1790. It is, therefore, a very important question, whether the transcript of the chancery court for Washington county, Georgia, shows that there was a probate of the will. All

that we find in the transcript, bearing upon this point, is an affidavit by one of the subscribing witnesses, that "he believes that he *assigned* his name at the last part of the within instrument of writing," taken before "J. Thigpen, J. P.;" and following the affidavit, an entry that the executors were sworn. The record also shows, that the executors discharged several of the duties of the executorial trust, and were recognized as executors by the court.

[2.] We must judicially know, that the proceedings of courts of the grade and jurisdiction of the court of ordinary in Georgia, as indicated by the constitution and laws of the State in evidence in this case, are lamentably loose, and that their records are made up with peculiar carelessness. It is the duty of courts, in which the validity of such proceedings is assailed, to construe the language used in a light as favorable to their maintenance as it will admit, without undertaking to supply that which is absolutely wanting.—*King v. Kent*, 31 Ala. 542.

[3.] In the probate of wills, there is but little formality. It seems that there was, under the ecclesiastical law, no formal announcement of the judgment of the court upon the sufficiency of the proof; but the proof made was endorsed upon the will, and letters testamentary issued to the executors.—2 Swinburn on Wills, 806; 1 Williams on Ex. 239; Dayton on Surrogates, 194; *Slaughter v. Cunningham*, 24 Ala. 260. It is not shown to us, that, at the time when the will now under consideration was recorded, there was any law in Georgia, requiring any greater particularity. Indeed, the exemplification of a will, with no greater evidence of probate, was by this court, in *Slaughter v. Cunningham*, *supra*, held admissible in evidence, upon certificates pursuant to the act of congress of 1790. The only manifestation of the judgment of the court upon the sufficiency of the proof, which seems to have been in practice given, where greater formality was not exacted by the statute, was the letters testamentary, and the recording of the instrument. We

accordingly find the expressions probate and letters testamentary used as convertible terms.—1 Williams on Ex. 239; Dayton on Sur. 194; 1 Jar. on Wills, 214, chap. ix, § 1; King v. Netherseal, 4 Term, 258. In the case of Lay v. Kennedy, (1 Watts & Ser. 396,) there was no judgment as to the sufficiency of the proof; and the court said: "Although there is no formal decree, that the proof of the will was deemed good; yet that the will was admitted to probate we cannot doubt, as otherwise the grant of the letters of administration would be preposterous and absurd." It is thus evident, from the practice in the proving of wills, from the manner in which the terms probate and letters of administration are used, and from the very nature of the acts themselves, that the court, in spreading the will upon the record, and granting to the executors authority to execute it, does assert the establishment of the will in its judgment. We think, therefore, that the record, upon a fair construction, must be regarded as asserting the appointment and qualification of the executors, and that the will was put upon the record; and these facts involve in themselves an assertion of the probate of the will.

The sufficiency of the proof was a question for the court which took the probate, and its decision cannot be collaterally assailed. It is, therefore, not important for us to inquire, whether the affidavit in the record should be intended to be the only proof upon which the court acted, or whether it was sufficient.

[4.] The view of the subject which we have taken, also renders it unnecessary for us to inquire, whether, from lapse of time, the probate could be presumed, under the circumstances shown; but upon that point we subjoin a list of authorities, which pertain to the question, whether such presumption might be drawn: Jordan v. Cameron, 12 Georgia, 267; Calvert v. Fitzgerald, Littell's Sel. Cas. 388-392; Battle v. Holley, 6 Greenleaf, 145; Giddings v. Smith, 15 Verm. 344; McArthur v. Carrie, 32 Ala. 75, and cases cited.

[5.] The other parts of the Georgia record, besides

the will, affidavit, and appointment of executors, could have had no other effect, than to support the conclusion that the will was admitted to probate; and there could be no injury from their admission in evidence.

[6.] The declarations of A. M. Griffin and Claiborne Griffin were admissible in evidence. They were the declarations of persons, under whom the defendant held, adverse to their interest; and were relevant, because they contributed to the identification of the property, if for no other reason.

[7-8.] The two points made by the appellant, that the court had no authority to allow an amendment, by striking out the name of a plaintiff who was dead at the commencement of the suit, and that depositions taken before the amendment should have been suppressed, are alike unmaintainable. The statute authorizes the making of amendments, by striking out the names of parties; and we can perceive no reason for restricting the authority to cases where the party was living at the commencement of the suit. As the amendment did not vary the issue, or render the testimony inapplicable, and there was nothing in the fact that the deposition was taken before the amendment calculated to injure the defendant, neither justice, nor any rule of practice known to us, required that the depositions should be suppressed.—*Goldsmith v. Picard*, 27 Ala. 142; *Agee v. Williams*, 30 Ala. 636.

[9.] We cannot agree that the clause of the will, under which the plaintiffs claim, is void for uncertainty. "In order to avoid a will for uncertainty, it must be incapable of any clear meaning."—*Mason v. Robinson*, 2 Sim. & Stu. 295. Such is not the character of the item of the will which we are called upon to construe. We think we take no undue liberty with the words, when we interpret it as creating a life-estate in the widow, with remainder to the five children of the testator, if living at her death; and if any of the five children should die before the death of the widow, then to such of the five children as might be living at that time, and the then existing heirs of the body of such as might be dead; and if any

of the five children should die before the death of the widow, and leave no descendants, then to the surviving children. The exigency of this case does not require us to extend our construction farther. It is unnecessary for us to inquire into the effect of the provision, "that if any one of the children should die before it comes of age, that they all should have his legacy divided among them." It does not appear that any of the children died before coming of age. It is manifest, however, that the operation of this clause would be perfectly consistent with that of the previous item, except in the single contingency of some of the children dying under age leaving issue. Whether, in that contingency, such a construction could have been adopted as would have reconciled the two clauses, it is unnecessary to inquire. The phrase *heirs of the body* is shown by the context to have been used in the sense of lineal descendants living at the death of the tenant for life, or at the time when the youngest child should come of age.—Powell v. Glenn, 21 Ala. 458; Williams v. Graves, 17 Ala. 62; Eliun v. Davis, 18 Ala. 132; Bell v. Hogan, 1 St. 536. The limitation over upon failure of heirs of the body, was, therefore, not too remote; and the persons who, at the designated time, answered to the legal description of heirs of the body, would take in default of such of the testator's five children as might not then be living.—Shackleford v. Bullock, 34 Ala. 418; 2 Jar. on Wills, 1-17.

Judgment affirmed.

MARTIN vs. REED.

[ACTION ON PROMISSORY NOTE, AGAINST MAKER.]

1. *Validity of contract made with slave.*—A promissory note, given to a slave, for money borrowed from him by a white man, is void, and will not support an action.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by John M. C. Reed, against W. B. Martin, and was founded on the defendant's promissory note for \$58, dated the 14th January, 1856, and payable on the 14th January, 1857. The complaint was in the form prescribed by the Code, (page 551,) for an action on a promissory note "by payee against maker." The defendant filed two pleas, the second of which was in these words: "For answer to the said complaint, the defendant says, that said promissory note, which is the foundation of this suit, was given to Henry, a slave of John Godwin, deceased, for money borrowed from said Henry; that plaintiff obtained said note from said Henry by transfer of said Henry; that said Henry acted and contracted for himself, and that his transfer to plaintiff was void; wherefore defendant says, that plaintiff ought not to recover in this action." The circuit court sustained a demurrer to this plea, and its judgment on the demurrer is now assigned as error.

L. W. MARTIN, for the appellant, cited *Stanley v. Nelson*, 28 Ala. 514; *Tannis v. Doe d. St. Cyre*, 21 Ala. 454; *Shanklin v. Johnson*, 9 Ala. 271; *Brandon v. Bank of Huntsville*, 1 Stewart, 320; Code, § 1018.

PHILIPS & WEEMS, *contra.*—The law presumes, that money in the possession of a slave belongs to his master, and that all transfers, &c., are made by and with the con-

sent of the master; and the plea does not state facts which negative this presumption.

STONE, J.—[March 30, 1861.]—The *status* of a slave, under our laws, is one of entire abnegation of civil capacity. He can neither make nor receive a binding promise. He has no authority to own anything of value, nor can he convey a valuable thing to another. Hence, he cannot, of himself, give a consideration, "valuable in the law," which consideration is necessary to uphold an executory promise; and indeed, "any person who sells to, or buys or receives from any slave, any article or commodity of any kind or description, [other than vinous or spirituous liquors,] without the consent of the master, owner, or overseer of such slave, verbally or in writing, expressing the articles," &c., is guilty of a misdemeanor. Code, § 3285. Vinous and spirituous liquors had been provided for in a previous section.—Code, § 3283. Money received from a slave comes within section 3285. We have, then, the case of a slave, who could not be the owner of money, but holding money which, in the law, was the property of his master, (*Webb v. Kelly*, at the present term,) having no civil capacity to part with that money, or to receive a promise to repay the same, but who does part with it to a white person,—the latter, in the act of receiving it, committing an indictable offense under our penal statutes. Nay more: Mr. Martin, in receiving the money from the slave, and retaining it, subjected himself to an action at the suit of Mr. Godwin, for money had and received.—*Brandon v. Huntsville Bank*, 1 Stew. 341. Can a right of action be based on such a promise as this?

In the leading case of *Fable v. Brown*, (2 Hill's Ch. 397.) the court of appeals of South Carolina—Ch. Harper delivering the opinion—ruled, that "an executory contract, made with a slave, cannot be enforced. No action could be maintained on a bond or note given to a slave. Neither master nor slave could maintain an action," &c. In the case of *Gregg v. Thompson*, (2 Const. Rep. 330.)

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the suit was brought by the master, on a note payable to his slave. The court decided, that the action could not be maintained. See, also, Cobb on Slavery, § 268.

The defense set up in the second plea, if proved, will bar all action on the note in suit; and the circuit court erred in sustaining the demurrer to it.

Reversed and remanded.

MEAHER vs. COX, BRAINARD & CO.

[BILL IN EQUITY FOR DISSOLUTION AND SETTLEMENT OF PARTNERSHIP.]

1. *When equity will decree dissolution of partnership.*—Although the defendants may not have committed such acts of misconduct, or been guilty of such willful violation of the terms of the contract, as would authorize a court of equity to decree a dissolution of the partnership for that cause; yet a dissolution will be decreed, where it appears that they refuse to carry out one of the terms of the articles of partnership, and insist that, in order to conduct the partnership business successfully, that stipulation must be either changed or disregarded; that they have refused to correspond with the complainants, on matters connected with the partnership business; that the state of feeling between the parties justifies the apprehension, that the joint business can be no longer prosecuted to the mutual advantage of all the partners; that there is no partnership property which might be sacrificed by a sale, and that a dissolution would not probably inflict any material injury on either party.
2. *Jurisdiction of equity, in such case, not affected by stipulation providing for reference to arbitration.*—A stipulation in articles of partnership, providing for a submission to arbitration of all matters of controversy which may arise among the partners, does not take away the jurisdiction of equity to decree a dissolution.
3. *Admission of new partners.*—New members cannot be introduced into an existing partnership, even by a majority of the partners, without the consent of the others; yet, if the others recognize and treat the new members as partners, and continue the business with them under the original articles, this is sufficient to make

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them partners, and to render the original articles operative as between them.

4. *What constitutes partnership.*—A contract between two steamboat companies, engaged in carrying passengers and freight between Montgomery, Mobile and New Orleans, by which it was stipulated, that each company should furnish a specified number of boats, of which the respective owners should retain the property and assume the risk; that all losses, injuries, and damages, caused to third persons or their property, whether by accident, negligence, want of skill, or other cause, should be borne solely by the owners of the boat causing or sustaining such loss or damage; that the compensation of agents, at specified points, to attend to the joint business, and all losses paid for injuries and damages on cotton shipped from the river above through to New Orleans, should be a charge against the joint fund, and be borne by the parties according to their respective interests; that the proceeds and earnings of each boat, deducting therefrom the running expenses, should be ascertained monthly, and be divided between the parties in proportion to the number of boats furnished by them respectively; that uniform prices should be established, and through tickets be good on all the boats; and that neither party should be interested in any other boat running on the same route, or make any private contract for his own advantage, which might be injurious to the others,—constitutes the parties partners *inter se*.

APPEAL from the Chancery Court at Mobile.

Heard before the Hon. M. J. SAFFOLD.

On the 7th July, 1858, Cox, Brainard & Co., (a firm composed of Henry L. Jayne, F. M. Johnson, and W. F. James,) J. M. & T. Meaher, (a firm composed of James M. Meaher and Timothy Meaher,) Byrnes Meaher and Stewart Cayce, all of whom were then engaged in running steamboats on the Alabama river, carrying passengers and freight between Montgomery, Mobile and New Orleans, entered into a contract, of which the following is a copy:

“Articles of agreement, made and entered into at Mobile, this 7th July, A. D. 1858, by and between the firm of Cox, Brainard & Co., of the first part, and the firm of J. M. & T. Meaher, Byrnes Meaher and Stewart Cayce, of the second part, all of the city of Mobile, *witness*, that the said parties, each being owners of steamboats em-

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ployed in carrying freight and passengers to and from Mobile, have agreed to employ and run steamboats in the trade of the Alabama river, and to New Orleans, in concert; each party to furnish, properly equipped and fit for service, at their own cost and expense respectively, a certain number of boats, as agreed between them, and to divide between them, in certain proportions, the net proceeds of their freight, passage-money, and other earnings, as they may accrue, after satisfying their running expenses. Whereupon, to accomplish said object, the said parties have contracted, agreed, and mutually stipulated with each other, as follows:—

(The first three clauses provide, that Cox, Brainard & Co. shall furnish ten, and the other parties two steamboats, which are specified by name, and a particular part of the business allotted to each,—some to run between Mobile and New Orleans, and others between Mobile and Montgomery; some during the winter season, or high water, and others during the summer season.)

“4. It is further mutually agreed between the parties, that each of them shall, during the continuance of this agreement, constantly keep ready provided, equipped and fit for service their proportion of boats as herein-after stipulated, so that they may perform the service required of them; and, in the event of the loss or disabling of any of said boats, they shall be replaced, when wanted, by the proper party, by others fit for the service, as near as may be.

“5. It is also agreed, that the said several boats shall be and remain the property of each of the parties respectively, as heretofore; that they shall continue to be the owners of said boats, and they shall be at the risk of their respective owners in all things. All repairs, such as are usually made by the crews of the boats while in use, causing no delay in the running of the boats, shall be made by their crews respectively; but no delay shall be allowed, to the end that repairs may be made by the crews; and where repairs are needed, they shall be promptly made, by proper workmen, employed and paid

by the owners of the respective boats at their own cost and charges, so that no delay shall occur, but that the boats shall be promptly fitted to perform their service; and if any boat be so disabled that the necessary time for repairs would cause the loss of more than one trip, then the proper party shall furnish another boat, capable to perform the service, in the stead of the disabled boat; and if the need of repairs, in any case, shall cause the loss of a trip of any boat, then the expenses of said boat, during the time lost, shall be at the charge of the owner.

"6. All losses, injuries, and damage, either to the vessel, cargo, crew, or passengers, or to third persons, whether caused by accident, negligence, want of skill, or otherwise, shall be at the sole charge of the owner of the boat causing or sustaining the loss; and the other party shall not be chargeable, nor called on, nor be responsible for any such loss, in any manner, either to the other party, or to third parties; and each party shall answer exclusively for all losses, and bear the same, and each party shall be exclusively responsible for its own officers and servants.

"7. It is furthermore agreed, that the total amount of the proceeds and earnings arising from the use of said steamboats shall be ascertained and divided monthly between the said two parties, and paid over to them respectively—say to Cox, Brainard & Co. four-fifths, and to the said Meahers and Cayce (the said parties of the second part) one-fifth; that correct and full accounts shall be kept by each boat of its receipts and expenditures, and of all its business, and that each party shall account to the other of all its business concerning the subject-matter of this contract; that nothing shall be charged, but the actual expenses of the running department of said boats, exclusive of the repairs, value of the use of the boats, insurance, taxes, &c.; the amount to be divided to be stated by computing the earnings, and deducting therefrom the wages, provisions, wood, supplies, and all daily expenditures properly belonging to the running of the boats for the time being. All bills paid must be filed,

and proper vouchers taken, in every instance, for money paid; which, together with the cash and an account thereof, with the books in explanation, shall be returned at the end of every trip, to the respective offices in Mobile of each of the parties, for the examination of the other party; and monthly settlements between the parties shall be made, and divisions of the proceeds, as aforesaid.

"8. It is agreed, that the prices of freight, passage, &c., shall be uniform on all the boats, as fixed by the parties from time to time; and that through tickets shall be good on all the boats; and that no private contracts shall be made by either party, contrary to the meaning and true spirit of this agreement, nor exclusively beneficial to either, nor injurious to either; but both shall, in good faith, so act as to promote the joint advantage, in a spirit of fairness and equality of right.

"9. It is expressly stipulated, that, during the continuance of this contract, neither party shall, under any pretense, run, or be interested, directly or indirectly, in the running of any other boat or boats on the Alabama river, or between Mobile and New Orleans; the profits of all said trade being for the joint account, under this agreement, as herein stipulated.

"10. It is mutually understood, that the salaries or compensation of agents to promote the joint business, at Montgomery, Selma and New Orleans, being for the joint benefit of both parties, shall be allowed as a charge, and paid out of the gross earnings of the boats, as a charge against the joint fund.

"11. It is further understood and agreed, that the days of departure of the boats of the parties of the second part, while this contract lasts, shall be Sundays and Mondays, unless changed and otherwise arranged by the consent of the parties to this contract.

"12. The parties respectively agree, that each shall account to third parties, for all lost freight, and also to each other for the freight-money; and that, at the expiration of each year of the duration of this agreement, each

party shall assume, as cash, all debts due to each boat respectively, and account for the amounts thereof to the other party, as if collected.

"13. It is furthermore the agreement of the parties, that all questions which may arise, as to the conducting of the business, under this agreement, shall be discussed and settled by consultation, by a committee of two persons, (one of whom shall be named by each party,) who shall determine the same; and each party shall annually nominate a person to act on said committee, and, in case of absence or sickness, each party shall be at liberty to appoint a substitute; and in case of a difference of opinion between them or their substitutes, and disagreements shall arise, then they shall call in a third person, selected by them jointly, who shall determine the point or points to be settled.

"14. It is agreed, that the books of all the boats, and all accounts, vouchers, and papers, shall be investigated, examined and audited by a committee of two persons, one of whom shall be nominated and selected by each party from time to time, and so often as needed, who shall make up the accounts for division under this contract; and that the books and papers shall, at all times, be subject to the inspection and examination of the said Cox, Brainard & Co., Meahers, and Cayce.

"15. It is further agreed, that in case the parties shall hereafter deem it to be for their mutual advantage and interest to increase the number of steamboats to be used and run on the river or lake, then each party shall furnish boats in the same proportion as under the present stipulations.

"16. It is agreed, that the compensation of the examining and auditing committee, and also all losses paid for injuries and damage on cotton shipped from the river above through to New Orleans, shall be charged to the general expense account, so that the charge shall be borne by the parties according to their respective interests.

"17. This agreement is to commence on the 5th July, 1858, and to continue until the 30th June, 1868, (inclu-

ding both days,) unless either party should conclude to sell out and abandon the business; then the other party shall have the preference and right to purchase the interest so to be sold, at the price and terms which may be offered for the same by others, and at which such party may be willing to sell.

"In witness whereof," &c.

(Signed by each firm, and by each partner individually.)

On the 7th January, 1860, F. M. Johnson, Robert Otis and Moses Waring, as partners composing the firm of Cox, Brainard & Co., "and as trustees managing the business of said firm," filed their bill in equity against James M. Meaher, Timothy Meaher, Byrnes Meaher, and Stewart Cayce; asking a dissolution of the partnership formed under the articles above copied, and a settlement of the partnership accounts. The complainants alleged, that said partnership went into operation, under said articles, at the time therein provided; that Henry L. Jayne afterwards died, and William F. James withdrew from the firm of Cox, Brainard & Co.; that on the 1st July, 1859, complainants were appointed trustees to manage the business of Cox, Brainard & Co., and, as the active partners of said firm, were vested with all their rights and interest under the said contract with the defendants, and thenceforward continued to carry on the said partnership jointly with them; that an auditing committee was appointed, as provided in said articles, who stated the accounts of the parties, not for exact periods of one month, as therein provided, ("since that was found inconvenient in practice, as the month would often expire while the boats were on the way,") but for every period of five round trips, which approximated to one month; that this practice was, for convenience' sake, sanctioned and acquiesced in by all parties, and the accounts were thus stated up to the 1st July, 1859, when a balance of \$6,981.13 was found due from the defendants to the complainants, which was afterwards settled and paid, but not without considerable delay; that the accounts were af-

terwards stated by the committee, as before, up to the 9th August, the 15th September, and the 18th October, showing a large balance each time in favor of the complainants; that the defendants refuse to pay these balances, amounting in all to more than \$6,300, and insist that they will only settle at the end of each year; that the complainants, after repeated refusals on the part of the defendants, placed their claim in the hands of their attorneys and solicitors, with instructions to demand payment and a performance of the articles of partnership; that said attorneys addressed two letters on the subject to the defendants, to which no reply was returned, and afterwards called on them in person, and notified them, under instructions from the complainants, that, in consequence of their refusal to perform the terms of the contract, the complainants proposed to consider the contract as ended; that the defendants declined to make any answer to this proposition; that the defendants also claim "that they have the right, under said articles, to give credit for freight, &c., and are not bound to distribute, at the stated periods, anything else than money actually realized, but may retain all other assets until the end of the year, whereas the contract requires the distribution of all proceeds at the monthly periods;" and that, in consequence of these repeated refusals on the part of the defendants to comply with the stipulations of the articles, the partnership can be no longer successfully carried on, and the complainants have a right to insist on its dissolution. Copies of the articles of partnership, the accounts stated by the auditing committee, and the letters addressed by the complainants' solicitors to the defendants, were appended to the bill as exhibits.

The defendants filed a joint answer, admitting the execution of the contract shown by the articles, (but not that said contract constituted a partnership between the parties,) the conducting of the joint business under said contract up to the filing of the bill, the withdrawal of James, the statement of the accounts by the auditing committee, the settlement of the balance found due from

the defendants on the 1st July, 1859, their refusal to pay the balances afterwards found due from them, and their refusal to answer the letters and proposition of the complainants' solicitors. They insisted, that the accounts stated by the auditing committee were only designed to furnish the parties with information as to the condition of the business, and included cash and uncollected debts; that, under the twelfth article of the contract, they were only bound to assume as cash the uncollected debts at the end of each year, and not at the expiration of each month; and that "to require from either party monthly payments, including outstanding debts, would not only impose a hardship on the party paying, but would materially interfere with the success of the business itself." They alleged, that the complainants had not carried out the contract in good faith, and had violated its stipulations in several specified particulars; and justified their own refusal to reply to the communications of the complainants' solicitors, on the ground that the articles provided a mode of adjusting all controversies, and the complainants had not proposed to settle the matters in dispute in that mode. They also demurred to the bill, for want of equity, and for want of necessary parties.

The complainants having submitted a motion, on bill and answer, for a decretal order, declaring a dissolution of the partnership, and ordering a statement of the accounts by the master, the chancellor rendered the following decree:

SAFFOLD, Ch.—"It is suggested by the defendants, that the contract between the parties does not establish a partnership *inter sese*. In Smith's Executor v. Garth, (32 Ala. 368,) it is said: 'To constitute a partnership *inter sese*, there must be a mutuality of risks—an interest both in the profits and losses. These risks or interests are not required to be equal; nor is it important that they shall agree in kind. The investment may be unequal, and the parties may agree to divide the profits unequally; yet, if it be one of the terms of the contract

that each shall share in the risks and losses, and also in the profits to be realized, this constitutes them partners as between themselves.'—See authorities cited. This settles the law of this case upon the point raised. The articles express the agreement to be, 'to divide between them, in certain proportions, the net proceeds of their freight, passage-money, and other earnings, as they may accrue, after satisfying their running expenses.' The fourth and fifth articles provide for a separate ownership of the boats by the parties respectively, and for having them constantly ready and equipped, and against any delay for repairs, &c.; 'and if the need of repairs, in any case, shall cause the loss of a trip of any boat, then the expenses of such boat, during the time lost, shall be at the charge of the owners.' The seventh article provides for a division of the total amount of the proceeds and earnings, in certain proportions; 'that nothing shall be charged, but the actual expenses of the running department of the said boats, exclusive of the repairs, value of the use of the boats, insurance, taxes, &c.; the amount to be divided to be stated by computing the earnings, and deducting therefrom the wages, provisions, wood, supplies, and all daily expenditures properly belonging to the running of the boats for the time being.' The tenth article provides, that the salaries of the agents shall be paid out of the gross earnings of the boats, as a charge against the joint fund; and the sixteenth article provides, 'that the compensation of the examining and auditing committee, and also all losses paid for injuries and damage on cotton shipped from the river above through to New Orleans, shall be charged to the general expense account, so that the charges shall be borne by the respective parties according to their respective interests.' It is to be gathered from these stipulations, that there is a mutuality of risks—an interest in the losses, to the extent of satisfying the running expenses of the boats, such as wages, provisions, wood, supplies, and all daily expenditures; the salaries of the agents and examining and auditing committee, and losses on cotton

shipped through to New Orleans. Should it appear that the legitimate expenses, as above provided for, exceeded the gross earnings of one or more of the boats, and resulted in a loss to such boat, the loss would be a charge against the common fund; and so the parties seemed to consider it in making up their accounts. Suppose that, for a whole year, the legitimate expenses of the running department of the boats of one of the parties had exceeded the gross earnings of said boats, without culpable neglect or misconduct on their part causing that result, and the net profits of the boats of the other party had been considerable; there can be no question, that these profits would have been subject to division between the parties, in the proportions stipulated for; nay more, they would have been subject to a reduction first, to the extent of the losses of the unfortunate boats, and the balance subject to division; and upon the same principle, if all the boats of both parties had sustained losses, by the legitimate expenditures exceeding the gross income, the losses would have to be borne proportionately. It is true, that the sixth article stipulates against a mutuality of risks, as to a certain class of losses, injuries, and damages; and it was entirely competent for the parties, as between themselves, to provide against such mutuality of losses, and declare them not to be legitimate charges against the common fund. But, unless these stipulations covered the whole ground of mutuality of risks, the principle of the case above cited establishes a partnership *inter sese*.

"The next question to be considered is, whether the court will decree a dissolution of the partnership, on the case made by the bill and answer. In determining this question, it is proper for the court to look to the duties and obligations implied in the partnership contract, as well as to the express terms of the contract, and to the results of a dissolution to the partners. It is considered, that the defendants have not committed such acts of misconduct, or been guilty of such violation of the terms of the contract, as would authorize the court to decree a dissolution for that cause; nor does it appear, from the

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bill and answer, that they have willfully violated the contract in any regard; and no acts of the complainants are stated in the answer, which would induce the court, *ex mero motu*, to dissolve the partnership, especially when such dissolution is not assented to by the defendants. This is not a case, however, wherein it appears that any material damage is to result to the interests of either party, or a joint partnership property may be sacrificed by a sale on dissolution; and it is to be considered, that the partnership contract imposes upon both parties mutual good will and confidence, without which it would be impracticable to carry out the agreement beneficially to both parties. Moreover, if a dissolution were not decreed, violations of the contract, and violent and lasting dissensions, would probably result from a continuance of the partnership, engendering litigation and a final necessity for a dissolution. The court is of opinion, that the state of feeling between the parties at present warrants this apprehension, and that a dissolution should be decreed."

The chancellor accordingly decreed a dissolution of the partnership, and referred the matters of account to the master; and his decree is now assigned as error.

R. H. SMITH, for the appellants.—1. The contract between the parties did not create a partnership. There is no common property, and no joint control; no combination of property, labor and skill, for the common profit; no personal responsibility for the debts and engagements of each other, and no power to bind each other by contracts; the property of each is at his own risk, and subject only to his debts; and, on dissolution, there could be no lien for partnership debts.—1 Parsons on Contracts, 124; 3 Kent's Com. (last ed.) 20; Pattison v. Blanchard, 1 Selden, 186; Smith v. Wright, 5 Sanford, 118; Hodges v. Dawes & Co., 6 Ala. 217. The bill shows that the members composing the firm of Cox, Brainard & Co. have been changed, without the defendants' consent, and without consultation with them; which could not be done in case of a partnership.—Story on Partnership, § 5.

2. Whether considered as a bill for the dissolution of a partnership, or for the rescission of a contract, the complainants are not entitled to any relief, on the case made by the bill and answer. As the hearing was on bill and answer, the answer must be taken as true in all its parts. 4 Ala. 464. The seventh and twelfth articles, construed together, show that, while the accounts are to be adjusted monthly, and the cash balances to be paid over, the uncollected debts are to be assumed and accounted for only at the expiration of each year. If the complainants' construction be correct, the bill itself shows that, in practice, the parties have adopted a different construction; and the court will give effect to such practical construction.—Boyd v. Mynatt, 4 Ala. 79; Smith v. Jeyes, 4 Beavan, 503. Complainants assert a simple legal demand, recoverable at law; and as the balances between the parties are continually shifting, they should be left to their remedies at law.—Loscombe v. Russell, 4 Simon, 8. A court of equity will not undertake to adjust the squabbles of partners.—Wray v. Hutchinson, 2 My. & K. 235; Henn v. Walsh, 2 Edwards' Ch. 129. Particularly ought this rule to be enforced, where the articles provide a mode of adjusting differences, and the complainants do not show that they have sought that mode of redress.—Smith v. Mules, 10 Eng. L. & Eq. 103. The complainants show no right in themselves to maintain a bill in behalf of Cox, Brainard & Co.—1 Russell, 441. No cause for a dissolution is shown, in any view of the case. Story on Partnership, §§ 287-89.

GEO. N. STEWART, and E. S. DARGAN, *contra*.—1. The contract contains all the elements of a partnership, not only as to third persons, but as between the parties. Participation in the profits and losses, without regard to the mode of dividing either, constitutes a partnership. Smith's Executor v. Garth, 32 Ala. 868; Bostwick v. Champion, 11 Wendell, 571; S. C., 18 Wendell, 175.

2. Whether the contract be a partnership *inter se*, or only as to third persons, ample cause for dissolution is shown.

Waters v. Taylor, 2 Vesey & B. 808; Loscombe v. Russell, 4 Simon, 11; Gow on Partnership, 124-6, 246-7, 111-6; Collyer on Partnership, §§ 291-97, 194-6, 236; Story on Partnership, 418-14, 423, 290; 8 Kept's Com. 60.

R. W. WALKER, J.—[March 2, 1861.]—Whatever may be the proper construction of the 12th clause of the articles, when taken in connection with the 7th, it is admitted on both sides, that, by the agreement, the accounts are to be adjusted monthly, and the *cash* balances paid over. When the defendants were called on to pay the balances, as stated by the auditors, they did not object to the accounts, on the ground that they were made up in part of cash, and in part of uncollected debts, without distinguishing the cash from the debts; nor did they then, nor do they by their answer, express a willingness to pay the cash balances, according to the stipulation in the articles. On the contrary, the answer must be understood as insisting, that the business of the partnership cannot be successfully conducted, if the 7th clause of the articles is carried out as it is written; and the unwillingness of the defendants to abide by and execute that term of the agreement, is apparent. If, in adjusting the accounts, and ascertaining the balances to be paid over, the auditors did not proceed in the manner directed by the articles, this fact should have been pointed out, and the proper correction asked by the defendants, when called on for payment by the complainants. But, instead of this, they made no reply to the communications upon the subject sent to them by the complainants; and when applied to with a proposition from the complainants to terminate the partnership, they refused to say whether they would accede to it or not.

Looking at the whole case, it pretty plainly appears—*first*, that the defendants do not intend to carry out one of the terms of the agreement, but insist that, in order to carry on the partnership business, this feature of the agreement must be either disregarded or changed; *second*, that they have refused, in the instances specified, to cor-

respond with the complainants, on matters connected with their business; and, *third*, that the state of feeling between the parties justifies the apprehension, that the business cannot be continued to the mutual advantage of the partners. While, therefore, it may be true, as said by the chancellor, that the defendants have not committed such acts of misconduct, or been guilty of such willful violation of the terms of the contract, as would authorize the court to decree a dissolution *for that cause*; yet we think that the combination of circumstances above enumerated does justify a dissolution, in this particular case; which is not one in which there is any joint property, which might be sacrificed by a sale; or where it is probable that a dissolution would inflict material injury on either party; and in which, moreover, it is obvious, from the very nature of the undertaking, that good will, confidence, and concert of effort, (important elements of success in every partnership,) are indispensable to the profitable management of the business.—See 1 Story's Equity, § 673; Collyer on Partn. §§ 297, 291, 119, and notes; Story on Partn. §§ 275, 289, 290, and notes; Waters v. Taylor, 2 Ves. & B. 299; Baring v. Dix, 1 Cox, 212; Bishop v. Breckles, 1 Hoff. Ch. 534.

[2] The clause providing for the submission to arbitration of all matters of dispute, has nothing to do with the question, whether equity should decree a dissolution. No mere agreement to refer a controversy to arbitration, can oust the proper courts of their jurisdiction.—Collyer on Partn. §§ 250–51, 253, and notes; Stone v. Dennis, 3 Por. 231; 1 Story's Eq. § 670

[3.] As partnerships are founded in personal confidence and *delectus personarum*, it is a settled principle, that no partner, and no majority of partners, can introduce a new member, without the consent of the others. But in this case, after the complainants succeeded to the interests of the persons originally composing the firm of Cox, Brainard & Co., the defendants recognized and treated them as partners, and continued the business, in conjunction with them, under the original agreement.

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This was quite sufficient to make the complainants partners; and the original articles remained operative, as between them and the defendants. —See Rowland v. Booyer, 10 Ala. 690; Cowles v. Garrett, 30 Ala. 349.

[4.] We do not deem it necessary to add anything to what is said by the chancellor, in support of the proposition, that the agreement constituted a partnership *inter sese*. We cite, however, as sustaining that view, Champion v. Bostwick, 18 Wend. 175; and Pattison v. Blanchard, 1 Seld. 186.

With these explanations and additions, we approve of and adopt the opinion of the chancellor.

Decree affirmed.

MOSELEY'S ADM'R vs. MASTIN.

[DETINUE FOR SLAVES.]

1. *Validity of grant of administration.*—A grant of letters of administration in chief, when there has been in fact a previous administration, which had terminated by the death of the administrator, (these facts not appearing in the second grant,) is valid as a grant of administration *de bonis non*, and void only as to the excess of authority which it purports to confer.
2. *Judicial notice of meaning of words.*—The appellate court will take judicial notice of the fact, that the word "adm'r," following the plaintiff's name in the complaint, is an abbreviation for the word *administrator*.
3. *Admissibility of parol evidence in aid of record.*—A grant of letters of administration on the estate of E. M. deceased, when it appears that there were two persons (father and son) of that name, each leaving an estate in the county to be administered, may be shown by parol to refer to the estate of the son.
4. *Presumption of injury from error.*—If evidence is erroneously excluded by the primary court, on a single specified ground, the appellate court will presume injury from the error, although it appears that the evidence was, *prima facie*, inadmissible on another

ground, which, if the objection had there been raised, might have been obviated by the introduction of other evidence.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by Joseph D. Hopper, as the administrator of Elisha Moseley, junior, deceased, against Peter B. Mastin. In the summons, the plaintiff was described as the administrator of Elisha Moseley, jr., deceased; in the marginal statement of the parties' names in the complaint, "as adm'r of Elisha Mosely, jr., deceased;" and in the body of the complaint, "as adm'r of all the goods and chattels, rights and credits of Elisha Moseley, jr., deceased, which were left unadministered by the administrator in chief." The slaves in controversy belonged to Elisha Moseley, senior, who was the father of plaintiff's intestate, and were given by him to his said son, on the marriage of the latter, in 1836, or 1837. The son carried the slaves home with him when he commenced housekeeping, and kept them until his death, which occurred about twelve months afterwards. On the death of the son, the father carried his wife and the slaves to his own house, declaring his intention to keep the slaves for the child with which his daughter-in-law was then pregnant. Letters of administration on the estate of the son were granted to the father on the 2d March, 1838, but he did not include the slaves in his inventory of the estate; and in January, 1840, on settlement of his accounts, a decree was rendered against him, in favor of the intestate's wife and child, for the balance of money ascertained to be in his hands, but he was not discharged from the trust. The father died in 1843; and the slaves were afterwards sold by his administrator, under an order of court, and were purchased at the sale by the defendant. The father and son both lived and died in Montgomery county, Alabama, and letters of administration were there granted on their respective estates.

After having proved the facts above stated, the plain-

tiff offered to read in evidence his letters of administration, which were granted by the probate court of Montgomery, on the 6th August, 1856, and which were in the following words: "This day came Joseph D. Hopper, and applied for letters of administration on the estate of Elisha Moseley, deceased; and it appearing to the court that the deceased has been dead more than forty days, and that he died in Montgomery county, Alabama; and the said Joseph D. Hopper having entered into bond, in the sum of six thousand dollars, with J. F. Jackson and Thomas H. Watts as his sureties, and taken the oath of office, it is ordered, that letters of administration issue to Joseph D. Hopper on the estate of Elisha Moseley, deceased; and ordered, that said administrator make return of an inventory to the court in sixty days." "The plaintiff stated, that he expected to prove, in connection with said order, that he had duly qualified as such administrator, pursuant to said order, and was acting as such under it at the commencement of this suit. The defendant objected to the reading of said order in evidence, on the ground that, on the facts hereinabove stated, said order was null and void; and on the further ground, that there was a variance between the complaint and said evidence, because the order showed that he was appointed administrator generally, while he sued as administrator *de bonis non*." The court sustained the objections, and excluded the evidence; to which the plaintiff excepted, and took a nonsuit; and he now assigns this ruling of the court as error.

WATTS, JUDGE & JACKSON, for appellant.—The grant of administration to the plaintiff was not void.—Ikellheimer v. Chapman's Adm'r, 32 Ala. 676; Savage v. Benham, 17 Ala. 119; Herbert v. Hanrick, 16 Ala. 581; Speight v. Knight, 11 Ala. 461. The entire record of the administration on the estate, taken together, shows that the grant could not be an administration in chief, but could only operate as an administration *de bonis non*; and as such it must be considered, since it is not void. Hence,

the plaintiff was properly described as administrator *de bonis non*, and there was no variance.

GOLDTHWAITE, RICE & SEMPLÉ, *contra*.—The rights and liabilities of an administrator in chief are different from those of an administrator *de bonis non*.—Enicks v. Powell, 2 Strobh. Eq. 196. The title of an administrator in chief relates back to the death of the intestate, while the title of an administrator *de bonis non* reaches only to the assets which were not administered by his predecessor; and defenses may sometimes be made against the one, which would not avail against the other.—Judge, &c. v. Price, 6 Ala. 36; Fambro v. Gantt, 12 Ala. 298. The difference between these two kinds of administration constitutes a fatal variance between the allegations and proof in this case.—Scott v. Dansby, 12 Ala. 714; Flake & Froeman v. Day, 22 Ala. 132; Agee v. Williams, 27 Ala. 644; Dill v. Rather, 30 Ala. 57.

A. J. WALKER, C. J.—[Feb. 12, 1861.]—The grant of administration to the appellant was not void, on account of the omission of a recital of the facts upon which the jurisdiction of the court was predicated.—Ikelheimer v. Chapman, 32 Ala. 676; Savage v. Benham, 17 Ala. 119. As there had been a previous administration upon the estate, which was terminated by the administrator's death, there could not be an administration in chief, and it was improper for the court to appoint an administrator generally. The appointment should have been in terms restricted to the character of an administrator *de bonis non*. But we do not think the appointment ought therefore to have been held void *in toto*. The authority of an administrator *de bonis non* is precisely that of an administrator in chief, lessened in consequence of the previous administration; and the error of the court, in omitting to properly qualify the grant of administration, had only the effect of conveying an excess of power; and the grant of administration should be held void only for the excess of authority. A consideration of the appointment, in connection with the previous administration, shown by

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the records of the court, qualifies it, and gives it the character of an administration *de bonis non*. The plaintiff was, therefore, properly described as administrator *de bonis non*; and the apparent variance between the character in which he sues, and that bestowed by the grant of administration, is harmonized and reconciled by the facts, that there had been a previous administration, which was terminated by death.—See *Steene v. Bennet & Sergeant*, 24 Verm. 303; and *Grand v. Herrera*, 15 Texas, 533, which seem to be precisely in point, sustaining the foregoing views.

Judgment reversed, and cause remanded.

NOTE BY REPORTER.—The appellee's counsel afterwards submitted a petition for a rehearing, in which they urged an affirmance of the judgment of the circuit court, on the following grounds:

1. As the plaintiff never had possession of the slaves, he cannot recover in his individual character.—*George v. English*, 30 Ala. 583. Looking to the body of the complaint, the only words descriptive of his representative character are, "as adm'r of all the goods and chattels," &c., "left unadministered by the administrator in chief;" and since nothing is averred to excuse the profert and proof of his representative character, (*Worthington v. McRoberts*, 7 Ala. 814,) and the defendant is not estopped from denying it, (*Harbin v. Levi*, 6 Ala. 399,) this court will not presume, against the judgment of the circuit court, that these words indicate a suit by him as administrator.—*Chapman v. Spence*, 22 Ala. 588. No intendants are to be made in favor of the pleader, and against the correctness of the judgment.—*King v. Griffin*, 6 Ala. 387; *Agee v. Williams*, 27 Ala. 644; S. C., 30 Ala. 636; *George v. English*, 30 Ala. 583.

2. But, if the action is brought by the plaintiff in his representative character, the order of the probate court was properly excluded. A grant of letters of administration on the estate of "Elijah Moseley, deceased," without any other addition or description of the person, when

it is shown that there were two deceased persons, father and son, each bearing that name, and each leaving an estate in the county, must be construed and held as a grant of administration on the estate of the father.—Wilson v. Stubs, Hobart, 330; Lepiot v. Browne, 1 Salkeld, 7, pl. 16; Sweeting v. Fowler, 1 Starkie, 106; Boyden v. Hastings, 17 Pick. 200. The construction of the order of the probate court was a question for the determination of the court, and with which the jury had nothing to do.—Wyatt v. Steele, 26 Ala. 639; Bishop v. Hampton, 15 Ala. 761; S. C., 19 Ala. 792. Parol evidence was not admissible to change the legal effect of the grant, by showing that it was intended to refer to the estate of the son.—Hudson v. Gayle, 10 Ala. 116; Flournoy v. Mims, 17 Ala. 86; Ware v. Roberson, 18 Ala. 105. No such evidence was offered by plaintiff, even if it were admissible; and this court will not presume, for the purpose of reversing the judgment, that the plaintiff could have made the necessary proof.

In response to this application, the following opinion was, on a subsequent day of the term, delivered:

A. J. WALKER, O. J.—As to the first point made in the petition for a rehearing, we have only to say, that the court must judicially take notice of such abbreviations as “adm'r,” or acknowledge itself incompetent to understand the commonest writings.

After a careful consideration of the second point made, and the authorities adduced in support of it, we cannot find in it a reason for changing the conclusion which we have heretofore announced. The authorities cited by the counsel show, as we think, most clearly, that if the administration would, under the circumstances stated, be deemed *prima facie* an administration upon the estate of the senior Moseley, it may nevertheless be shown to have been in fact an administration upon the estate of the junior Moseley.

Two specific objections were made to the plaintiff's testimony in the court below, one of which implied an

admission that the administration was upon the estate of the junior Moseley; and the bill of exceptions states, that the court sustained the objections, and excluded the evidence. The objection to the evidence stated in the second point of the petition for a rehearing, was not one of the objections made in the court below, but is now brought forward for the first time. If that objection had not been excluded from the attention of the plaintiff's counsel, and of the court, by the other specific objections which were made, it might have been obviated. The court erred in sustaining the specific objections which were made; and we cannot affirm that it was error without injury, because there was another objection which might have been made, and which, if made, might have been obviated. It is our duty, therefore, to reverse, notwithstanding there may have been another objection, which might have been fatal to the admissibility of the evidence, but which was of such a nature that, if it had been made in the court below, it was capable of being obviated.

It must be admitted, that the exclusion of illegal evidence, for a wrong reason, would not be a reversible error.—*Jordan v. Owen*, 27 Ala. 152. But it would be improper for the court to assume that the excluded evidence was illegal. Although it may have been, *prima facie*, illegal, yet, in connection with other evidence, it might have been made legal. We cannot presume that the other evidence which was necessary, in connection with that excluded, to make out the plaintiff's right to sue in the capacity of administrator, would not have been offered, when both the motion to exclude, and the order excluding, were expressly put upon other grounds than the want of such evidence, and one of those grounds implied an admission that the evidence was not obnoxious to the objection now made.

The petition for a rehearing is overruled.

BANK OF MONTGOMERY vs. PLANNETT'S ADM.

[ACTION FOR MONEY HAD AND RECEIVED.]

1. *Proof of account by entries made by deceased clerk.*—Books of account, kept by a deceased clerk, and all other entries or memoranda made in the course of business or duty, by one who would be at the time a competent witness to the fact which he registers, are held competent evidence from the presumed necessity of the case; but the reason of the rule ceases, and the rule itself consequently fails, when it appears that there is other and better evidence of the same facts; as where it is shown to be the custom of a bank to pay out money only on the checks of its depositors.
2. *Statute of non-claim.*—A claim against the estate of a deceased person is barred, unless presented to the personal representative within eighteen months after its accrual, or within eighteen months after the grant of letters testamentary or of administration, (Code, § 1883,) notwithstanding the failure of the personal representative to give notice to creditors, as required by the statute.
3. *Agency vel non, question of fact; charge invading province of jury.*—Where the fact of agency is controverted, and there is any evidence tending to establish it, the sufficiency of that evidence is a question for the jury, under appropriate instructions from the court; and a charge, asserting that the evidence is not sufficient to prove the agency, is erroneous.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN GILL SHORTER.

THIS action was brought by the administrator of Stephen Plannett, deceased, to recover certain moneys alleged to have been deposited with the defendant by said Plannett in his life-time; and was commenced on the 5th March, 1857. The complaint contained a count on an open account, and another on a stated account. The defendant pleaded, in short by consent, the general issue, payment, and set-off; and to the plea of set-off the plaintiff replied the statute of non-claim. "On the trial,"

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as the bill of exceptions states, "the plaintiff's account against the defendant was established by entries in a deposit-book, (commonly called a 'pass-book,') to the credit of plaintiff's intestate, and in his own name, made by the defendant's teller. To support the pleas of payment and set-off, the defendant produced its book of original entries, containing items of account, both debit and credit, between said intestate and defendant; and, having proved the handwriting of the officer by whom said entries were made, and his death, and that he kept correct accounts, offered to read said entries to the jury; but, it having been proved to be the custom of the defendant to pay out moneys to depositors on checks drawn by them, the court required the production of the checks, and refused to allow said book of original entries to go before the jury, as sufficient evidence, without the checks; to which the defendant excepted."

"The defendant introduced oral evidence before the jury, tending to show that, in 1854 and 1855, plaintiff's intestate was in bad health, and so continued up to the time of his death in June, 1855; that said intestate, from the 1st June, to the 1st December, 1854, was absent from this State; that before he left, during his absence, and after his return, up to within a short period of his death, he was the proprietor of a billiard-room in the city of Montgomery, which he rented from one Washington Tilley; that during all this time, on account of his bad health, he was unable to give his personal attention to his business, but entrusted it to the management and control of one V. D. Carnot, who exercised complete control over it; making contracts in reference thereto, and discharging liabilities. The defendant further proved the declarations of said intestate, after his return to Montgomery, that said Carnot was his agent; and these declarations were made whilst said Carnot was still attending to said billiard-room business, and in a conversation which had reference to said business. Some of the entries on said 'pass-book' appeared to have been made during the time said intestate was absent from this State,

and whilst said Carnot was attending to his billiard-room. The defendant read in evidence, after proving the signature thereto, two notes signed by said intestate, for \$150 each, dated the 1st October, 1852, and payable, respectively, on the 1st August, and the 1st November, 1854, to Washington Tilley or order;" (each of which purported to be given "for one quarter's rent of billiard-room," and was endorsed in blank by said Tilley;) "and, in connection therewith, two checks on said defendant, drawn by said Carnot, and signed, 'Stephen Plannett, by V. D. Carnot,' bearing date respectively on the days of the maturity of said notes, and purporting on their face to be drawn for the purpose of paying said notes. The defendant introduced in evidence, also, a number of other checks, drawn on said defendant, for various sums of money, bearing various dates between the 1st October, 1854, and the 1st June, 1855, all signed like the two above mentioned. The handwriting of said Carnot to each of said checks was proved; but there was no proof that any of them were drawn on account of the billiard-room. No other evidence on the subject of said Carnot's agency, or his authority to draw said checks, than as above recited, was offered by either party. There was no evidence to show that said intestate, after his return to Montgomery in December, 1854, had ever notified defendant that said Carnot was not his agent; nor any evidence to show that he had any knowledge of checks drawn on his funds in bank by said Carnot. Letters of administration on said intestate's estate were granted to plaintiff in July, 1855; but there was no proof of any notice to creditors, by publication in any newspaper; nor was there any proof that said notes had been presented to said administrator within eighteen months after the grant of his letters; and, as to these notes, pleaded as a set-off by the defendant, the plaintiff replied the statute of non-claim. The court charged the jury—1st, that the evidence was not sufficient to show that said Carnot had authority to draw said checks, or any of them, in behalf of the plaintiff's intestate; and, 2d, that each of the notes offered in evi-

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dence under the plea of set-off was barred by the statute of non-claim; to which charges the defendant excepted."

The rulings of the court on the evidence, and the charges to the jury, are now assigned as error.

WATTS, JUDGE & JACKSON, for appellant.—1. The entries made by the deceased clerk were competent evidence to prove the account.—*Clemens v. Patton, Donegan & Co.*, 9 Porter, 289; 1 Greenl. Ev. §§ 115-17, 120, 151; *Batre v. Simpson*, 4 Ala. 305; *Everly v. Bradford*, 4 Ala. 373.

2. The first charge invaded the province of the jury. Agency is a question of fact.—*McClung's Executors v. Spotswood*, 19 Ala. 165; *McDonnell v. Branch Bank at Montgomery*, 20 Ala. 313.

3. The filing of a plea of set-off, which is a cross action, is a sufficient presentation of the claim to prevent the bar of the statute of non-claim. Moreover, the administrator had not published notice to creditors, as required by the statute.—Code, § 1734.

MARTIN, BALDWIN & SAYRE, *contra*.—1. The checks were higher and better evidence than the parol testimony of the clerk, if living, would have been; and consequently, were better evidence than the entries, which are only admissible, when the clerk, if living, would be competent to prove the facts.—*Batre v. Simpson*, 4 Ala. 312.

2. When the facts are ascertained, agency becomes a question of law.—*Wood v. McCain*, 7 Ala. 800; *Dearing v. Lightfoot*, 16 Ala. 28; *Scarborough v. Reynolds*, 12 Ala. 252; *McKenzie v. Stevens*, 19 Ala. 691; *Story on Agency*, § 87.

3. The notes were barred by the statute of non-claim, which does not require the publication of notice to creditors before it begins to run.—Code, § 1883; *McHenry v. Wells' Adm'r*, 28 Ala. 451.

STONE, J.—[Feb. 12, 1861.]—The doctrine is settled in this State, "that books of accounts, kept by a deceased

clerk, and all other entries or memoranda made in the course of business or duty, by any one who would at the time have been a competent witness to the fact which he registers, are admissible evidence."—*Batre v. Simpson*, 4 Ala. 305; *Everly v. Bradford*, *ib.* 371; *Clemens v. Patton, Donegan & Co.*, 9 Por. 289. This evidence is received on what is considered the *moral necessity* of the case.—*Phil. Ev. (Cow. & Hill's Notes, by Van Cott.)* 1 pt. 305, *et seq.*; 1 *Greenl. Ev.* §§ 115, 120.

This doctrine resting on the presumed necessity of the case, it follows that, when the reason ceases, the rule also fails; *cessante ratione, cessat ipsa lex*.—*Cow. & H. Notes*, 1st pt. 310. Hence, when goods were delivered on written orders, it was ruled by the supreme court of Pennsylvania, (Ch. J. Tilghman delivering the opinion of the court,) that the books were not evidence.—*Smith v. Lane*, 12 S. & R. 80. To the same effect are the cases of *Tenbroke v. Chapman*, 1 Coxe, (N. J.) 288; *Townley v. Wooley*, *ib.* 377. See *Cow. & H. Notes*, 1 pt. 310.

In this case, it is shown that the custom of the bank was, to pay out moneys on the checks of its depositors, and not otherwise. This removes the necessity under which the books would be evidence, and, of course, renders the rule inapplicable. The circuit court did not err in excluding the books from the jury.

[2.] The record shows that the notes of Mr. Plannett were not presented to the administrator within eighteen months after they accrued, nor within eighteen months after the grant of letters of administration.—*Code*, § 1833. It is not essential to the operation of the bar, that the administrator should have given notice under the statute, (*Code*, § 1784,) although his failure to do so is obviously a breach of duty on his part.—See *Cawthorn v. Weisinger*, 6 Ala. 714; *McHenry v. Wells*, 28 Ala. 451. The court did not err, in charging the jury that the notes of Mr. Plannett, offered in defense, were barred as a set-off by non-claim.

[3.] In charging "that the evidence was not sufficient to show that Carnot had authority to draw said checks,

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or any of them, in behalf of the plaintiff's intestate," the circuit court erred. In the case of *McClung v. Spotswood*, (19 Ala. 165,) this court, Ch. J. Dargan delivering the opinion, said: "But in most cases, if not in all, the question of agency is a matter of fact, which it is the province of the jury to determine upon, under the instructions of the court; and if the testimony tends to prove, that the person acting as agent had authority from his principal to do the act, then it is manifest that the court cannot exclude from the jury the act itself, without over-stepping the law of its duty, and assuming to determine a matter which belongs to the jury, to-wit, the authority of the agent to do the act." In the case from which we have quoted, the fact of agency was left by the testimony in extreme doubt; yet this court ruled, that the circuit court erred in excluding the evidence from the jury. In the case of *McDonnell v. Br. Bank at Montgomery*, (20 Ala. 313,) a similar decision was pronounced on testimony of agency which was inconclusive.—*Roland v. Logan*, 18 Ala. 307; *Krebs v. O'Grady*, 28 Ala. 726; *King v. Pope*, 28 Ala. 601; *Fisher v. Campbell*, 9 Por. 210; *Strawbridge v. Spann*, 8 Ala. 821; *Barry v. Foyles*, 1 Pet. S. C. 811.

In the case of *Irwin v. Buckaloe*, (12 Serg. & R. 35,) the question was, whether one Moore was the agent of the defendant. The only evidence of agency was that of one witness, who testified, that "he had done business with Moore, as the agent of defendant, one or two years after the date of the receipt; and that the defendant, about the same time, had told him that Moore was his agent, and did business for him." Gibson, J., in delivering the opinion of the court, said, "The admission was a circumstance to be left to the jury, with a direction to regard the receipt as competent evidence or otherwise, as they should be satisfied, or not, of the existence of the agency when the receipt was signed."

These authorities are full to the point, that the evidence in this case ought to have gone to the jury, under an appropriate charge, for that body to have passed on the

question of Carnot's agency. As to the two checks drawn for the payment of the two notes of Mr. Plannett, and which, as the record informs us, "*purported on their face to be drawn for the payment of said notes,*" we do not perceive on what principle they were excluded from the jury. These notes were given for the rent of the billiard-tables, and Mr. Plannett was absent from the State when they matured. The proof is quite full, that Mr. Carnot was the agent of Mr. Plannett in the control of the billiard-room. These were facts clearly for the consideration of the jury, on the question of payment of the notes by those two checks. So, forming our opinion on the evidence recited in the record, we think the whole of the checks and orders should have been left before the jury, in connection with the other evidence on the question of agency, for decision by that body. If, under proper instructions, they found that Mr. Carnot was the agent of Mr. Plannett to control his funds in bank, and that on his checks, as such agent, the deposit had been drawn from the bank, this would amount to a good defense to this action under the plea of payment. We need scarcely add, that the doctrine of non-claim has no application to payments.

Reversed and remanded.

CRESWELL'S EXECUTOR vs. WALKER.

[BILL IN EQUITY BY EXECUTOR, FOR INSTRUCTIONS IN EXECUTION OF TRUSTS.]

1. *Validity of testamentary trust for emancipation of slaves at their election.*—A testamentary trust for the emancipation of slaves, the execution of which is made to depend on the election of freedom by the slaves themselves, is void, because they have not the legal capacity to make the election; and the same principle applies, where the executor is directed to carry the slaves, for the purpose

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of emancipating them, "to some non-slaveholding State, or to the republic of Liberia, as the said slaves may prefer."

Appeal from the Chancery Court of Greene.

Heard before the HON. JAMES B. CLARK.

THE bill in this case was filed by the executor of John T. Cresswell, deceased, against Mrs. Zernula Walker and others, as legatees and heirs-at-law of said testator; and sought the direction and instructions of the court, as to the construction of the testator's will, and particularly as to the validity and execution of the trusts contained in the fourth clause, which was in the following words: "It is further my will and desire, that my faithful slaves, Tom, Dublin, Ann and Maria, be liberated and set free; and to effect that object, my executor will have them taken, at the expense of my estate, to some non-slaveholding State, or to the republic of Liberia, as the said slaves may prefer, there to be free, and will furnish each of them such an outfit, out of my estate, as, in the judgment of my executor, will render them comfortable. But, should said slaves, or any one or more of them, prefer to remain in slavery, then I do hereby, in that event, will and bequeath said slaves, or such of them as prefer to remain in slavery, to my sister, Zeuly Walker, requiring her to will and bequeath said slave or slaves, at her death, to such person or persons as she may believe will treat them with kindness and humanity. If some of them prefer to remain, my executor will send those of them who will go, and furnish an outfit for them." The will was executed and published on the 4th October, 1856, in Greene county, the place of the testator's residence; and he departed this life a few days afterwards. The will was duly admitted to probate, and letters testamentary were granted to Samuel L. Cresswell, who was therein appointed executor. The executor sold the lands and perishable property, paid all the debts and specific legacies, and distributed the estate according to the provisions of the will; only keeping the slaves mentioned in the fourth clause, and retaining in his hands money enough to provide for

their expenses and outfit. In his bill he asserted, that the slaves had frequently expressed to him their desire to be emancipated, and had designated the country to which they wished to be carried; and declared his readiness and willingness to execute the trusts in their favor, if he could legally do so. The defendants filed answers, admitting all the facts alleged in the bill, but insisting that the trusts for the benefit of the slaves were void. On final hearing, on bill, answers, and agreed facts, the chancellor held, on the authority of *Carroll and Wife v. Brumby*, (13 Ala. 102,) that the trusts for the benefit of the slaves were void, and dismissed the bill, at the costs of the estate; and his decree is now assigned as error.

WM. P. WEBB, for the appellant.—The fourth clause of the testator's will creates a valid trust, which the executor is bound to execute.—*Atwood v. Beck*, 21 Ala. 590; *Abercrombie v. Abercrombie*, 27 Ala. 489; 8 Iredell's Eq. 258; 9 Humph. 616; 19 Geo. 35; 4 Leigh, 252; 12 Grattan, 117. What was said to the contrary in the case of *Carroll v. Brumby*, (13 Ala. 102,) must be regarded as a mere *dictum*, and is not sustained by the authority cited from 6 Porter, 269: and the case itself is opposed to the entire current of authority in othersouthern States.—See cases above cited; also, 6 Sm. & Mar. 98; 5 How. Miss. 805; 10 B. Monroe, 70; 2 Hill's Ch. 305; 6 Randolph, 654. Even if that case be adhered to, as a correct exposition of the law, the trusts in this case must be held valid; for the testator first directs his executor to emancipate the slaves, and then gives the slaves the election to defeat the bequest by remaining in slavery; and if they have not the legal capacity to make such election, the condition is void, and the trust stands unaffected by it—*Osborne v. Taylor*, 12 Grattan, 117; 2 Williams on Executors, (4 Amer. ed.) 1084–86; 3 Vesey, 325; 1 Jarman on Wills, 680–84.

JAS. D. WEBB, *contra*.—This court has expressly decided, that slaves have not the legal capacity to choose be-

tween freedom and slavery.—Carroll v. Brumby, 18 Ala. 102. That decision is founded on sound legal principles; and in the cases to the contrary, cited for the appellant, the question was not raised in the argument of counsel, and seems to have been assumed without consideration by the court. In this case, the will gives the slaves the right to elect between freedom and slavery, and to choose the country to which, if they elect freedom, they shall be removed; and the executor cannot carry out the trust, according to the provisions of the will, unless he is governed by their wishes, and conforms to their election.

R. W. WALKER, J.—[Jan. 29, 1861.]—In Carroll and Wife v. Brumby, (18 Ala. 102,) the testator had by his will declared, that certain of his slaves should be permitted to go to Africa, their passage to be paid, &c.; but, if they desired to remain subject to his daughter, as they had been to him, they should be permitted to do so; but in no event to be sold, or deprived of this privilege, either before or after the death of his said daughter. "Should they, or any, or all, prefer not to emigrate, then, and in that event, they shall be subject to my daughter, as they are to me." In passing upon this will, this court held, that the testator intended to give the slaves the option of freedom or servitude, but *that they had not the legal capacity to make the choice*; and that, the bequest of freedom being void, the title to the slaves was vested in the daughter. The same question has never since arisen in this court; and we are now asked to reconsider it, because, as is alleged, the decision is opposed to the current of authorities upon the subject, has no solid foundation of reason to support it, and appears to have been made without a special discussion of the principle involved.

It is true that many cases may be found, which silently recognize the principle, that a bequest of freedom, which is otherwise valid, is not rendered void by the fact, that the election of freedom by the slave is the declared condition on which it is to take effect. The courts of North

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Carolina, South Carolina, Georgia, Mississippi, Kentucky, and Tennessee, have all treated as valid bequests which provided for an election by slaves of freedom or servitude.—*Washington v. Blunt*, 8 Ired. Eq. 253; *Jordan v. Bradley*, *Dudley's R.* 170; *Frazier v. Frazier*, 2 Hill's Ch. 305; *Cleland v. Waters*, 19 Geo. 35; *Ross v. Vertner*, 5 How. Miss. 305; *Leech v. Cooley*, 6 Sm. & M. 93; *Graham's Exr. v. Sam*, 7 B. Monroe, 408; *John v. Moreman*, 8 B. Mon. 100; *Adams v. Adams*, 10 B. Mon. 20; *Isaac v. McGill*, 9 Humph. 616; *Wade v. Am. Col. Society*, 7 Sm. & M. 694.

Mr. Cobb, in his work upon the law of negro slavery, notices the suggestion made in *Carroll v. Brumby*, (*supra*), that a slave is incapable of making a choice between freedom and slavery, and says in reference to it: "The suggestion has not been approved by other courts, and we cannot see the force of it. The theory of a complete annihilation of will in the slave, is utterly inconsistent with all recognition of him as a person, especially as responsible criminally for his acts."—*Cobb on Slavery*, § 363.

Notwithstanding this long array of authorities, apparently in conflict with it, we are persuaded that the principle announced by this court in *Carroll v. Brumby*, (*supra*), is a sound one; and that any trust for emancipation, in the execution of which the election of the slave between freedom and servitude is prescribed as a necessary step, must fail, because slaves have not the legal capacity to make the election.

It is a remarkable fact, and one which may be thought to militate against the opinion we have just expressed, that in none of the numerous cases we have cited, except *Cleland v. Waters*, (19 Geo. 35,) does it appear that the question as to the legal capacity of slaves to make such election, was distinctly made by counsel, or fully considered, or expressly adjudged by the court. Hence we have spoken of these cases as silently recognizing the validity of bequests providing for an election by slaves of freedom or servitude. The legal capacity of slaves to make

such election has been rather assumed than settled in them. Consequently, with the single exception just mentioned, they have not the weight which would attach to cases in which the question had been directly made and argued by counsel, and fully considered, and distinctly decided by the court.

Assuming, then, that the trust in this case cannot be executed in the manner pointed out by the testator, unless the slaves choose to be emancipated, the question is, whether the making of this election is an act which slaves have the legal capacity to perform. Can a master, by his will, clothe his slaves with the irrevocable power of determining and changing, by an uncontrollable act of their will, their own civil *status*? Before we can give an affirmative answer to these questions, we must be prepared to say, that a master may confer upon slaves the legal right to acquire for themselves, by their own unforced and unrestrainable act, benefits and privileges inconsistent with the condition of slavery, and, at the same time, and by the same act, to divest the property rights of others.

So far as their civil *status* is concerned, slaves are mere property, and their condition is that of absolute civil incapacity. Being, in respect of all civil rights and relations, not persons, but things, they are incapable of owning property, or of performing any civil legal act, by which the property of others can be alienated, or the relations of property, or legal duties or trusts in regard thereto, in any wise affected. In a late case, the supreme court of North Carolina used this language: "Under our system of law, a slave can make no contract. In the nature of things he cannot. He is, in contemplation of law, not a person for that purpose. He has no legal capacity to make a contract; *he has no legal mind*. He is the property of his master, and all the proceeds of his labor belong to his owner. If property is devised or given to him, the devise or bequest is void, and the personalty given either belongs to the giver, or becomes the property of the owner. A slave has no legal *status* in our

courts, except as a criminal, or as a witness in certain cases."—Butler v. Faulk, 4 Jones' L. R. 238.

Chancellor Kent, in speaking of the laws of the southern States on the subject of negro slavery, says: "They are, doubtless, as just and as mild as is deemed by those governments to be compatible with the public safety, or with the existence of that species of property; and yet, in contemplation of their laws, slaves are considered, in some respects, as things, or property, rather than persons, and are vendible as personal estate. They cannot take property by descent or purchase; and all they find, and all they hold, belongs to the master. They cannot make lawful contracts, *and they are deprived of civil rights.*"—2 Kent, 258. So, in Emerson v. Howland, (1 Mason's R. 45,) Judge Story says, that the slave "*has no civil rights or privileges.*"

In the case of Girod v. Lewis, (6 Martin's R. 559,) it is said, that slaves have no legal capacity to assent to any contract; that whilst, with the consent of the master, they have the moral power to enter into such a connection as that of marriage, the marriage, whilst they remain in a state of slavery, could be productive of no civil effect, *because slaves are deprived of all civil rights.*

The numerous decisions in which it has been held, that a promise made to a slave, or for his benefit, is not enforceable in any legal tribunal; that a slave cannot sue or be sued, except that he is clothed with the statutory right of instituting a suit for freedom; that he cannot acquire or own property; that he has no legal capacity to make a contract, not even that of marriage,—all proceed upon the fundamental idea, that our slaves have no civil or social rights, and are incapable of performing by their own volition, and as a matter of right, any civil act which can be made the lawful foundation of vesting new rights in themselves, or of divesting the existing rights or determining in any respect the legal duties of others.

According to the legal conception of slavery, as it exists in the southern States, a human being endowed with

civil rights cannot be a slave. The possession of these rights is incompatible with the condition of slavery, and any attempt to confer them upon a slave, *durante servitude*, is an effort to accomplish what is legally impossible. Our law recognizes no other *status* than that of absolute freedom, or absolute slavery; and the courts have uniformly rejected, as a legal solecism, the idea that a slave, while a slave, can be invested with civil rights or legal capacity.—*Abercrombie v. Abercrombie*, 27 Ala. 494. Therefore, any attempt of a master to clothe his slave with the power to perform an act, which involves the exercise of civil rights and legal capacity, must, in the nature of things, fail.

It seems too clear for dispute, that, where a bequest is made to depend upon the declaration by the legatee of his election to accept the gift, the making of this election is a civil act. If a grant of an estate be made to a free person, on condition that he would elect a trade; or, if a bequest be made of either one of two named slaves the legatee may choose, if he will elect between the two, it could not be seriously contended, that the making of the election would not be a civil act. Surely that is a civil act, the performance of which either creates or divests valuable rights, or imposes a legal duty, or perfects a trust, which courts may enforce. So, when the act of a slave, in choosing between freedom and slavery, is a necessary step in the execution of a trust, the election is a civil act, and the trust is void, because it presupposes and requires that a slave, *durante servitude*, shall be invested with privileges which do not and cannot belong to one in his condition. Such a bequest is an effort on the part of the testator to impart to slaves rights which belong exclusively to freemen—thus placing them in that middle state between absolute freedom and absolute slavery, which our law, upon grounds of paramount public policy, refuses to recognize as legally possible.

It is true that slaves are human beings, and are endowed with intellect, conscience, and will. Their moral and intellectual qualities determine, to a considerable extent,

their value, and are often looked to in ascertaining the rights and liabilities of others in relation to them as articles of property.—See *Young v. Burton*, 1 McMull. Eq. 255; *Bean v. Summers*, 13 Gratt. 412; *Boyce v. Anderson*, 2 Peters, 150. Being endowed with intelligence, conscience, and volition, they are deemed capable of committing crime; and the same public policy which, so far as the performance of civil acts is concerned, refuses to consider them as persons, gives them a criminal *status*, and recognizes them as persons in respect of acts involving criminal responsibility. Because they are rational *human beings*, they are capable of committing crimes; and, in reference to acts which are crimes, are regarded as *persons*. Because they are *slaves*, they are necessarily, and, so long as they remain slaves, incurably, incapable of performing civil acts; and, in reference to all such, they are *things*, not persons.

This obvious distinction is overlooked by Mr. Cobb, in his criticism of the decision in *Carroll v. Brumby*.—See Cobb on Slavery, § 863. So far as civil acts are concerned, the slave, not being a person, has no legal mind—no *will* which the law can recognize. But, as soon as we pass into the region of crime, he is treated as a person, as having a legal mind, a will, capable of originating acts for which he may be subjected to punishment as a criminal. Considered in his relation to this latter class of acts, the theory of a complete annihilation of will in the slave, is wholly unfounded; while in relation to the former class of acts, it is entirely consistent, and, indeed, is the only theory that can be consistent, with the fundamental idea of negro slavery as it exists with us—namely, that in respect of civil rights and legal capacity to perform acts of a civil nature, the slave is not a person, but a thing.

It must not be supposed from what has been said, that our laws fail to afford slaves adequate protection against oppression or injury. This protection is not only secured by the fundamental law, the constitution of the State, (Art. 6, §§ 2 and 3,) but many statutes have been enacted with a view to the same end. The law punishes an as-

sault and battery upon them by any third person; prohibits the infliction upon them of cruel or unusual punishment; punishes the master, or other person standing in that relation, who fails to provide the slave with a sufficiency of healthy food, or necessary clothing, or to provide for him properly in sickness or old age, or treats him in any other way with inhumanity; and the master cannot relieve himself of the legal obligation to supply the slave's necessary wants, by voluntarily putting the slave away from him, without providing some one to occupy the relation of master to him. The law also secures to slaves the right of trial by jury, for all offenses above petit larceny, and provides them with counsel, in certain cases, at the public expense.—See *Atwood v. Beck*, 21 Ala. 609; 4 Ala. 66; Code, §§ 3297, 3300, 3316, 3319, 3329.

There is nothing inconsistent with the views expressed in this opinion, in the fact that a master may make his slave an agent. In that case, the acts of the slave are but the acts of the master; and this it is which gives them all their validity and effect. Hence it has been held, that a slave cannot act as the agent of any person but his master.—*State v. Hart*, 4 Ired. 246. "The agency of the slave, in truth, instead of affording any argument in behalf of the existence of his social or civil rights, is but an instance or illustration of the complete dominion of the master; of his entire control over all the powers and faculties of the slave; and of his right, consequently, to use him as an instrument or medium through which to make or execute contracts with third persons."—*Bailey v. Poindexter*, 14 Grattan, 132, 198.

In the case just cited, the question of the legal capacity of slaves to choose between freedom and slavery underwent a most elaborate discussion by eminent counsel, and received the fullest consideration from the court; and the conclusion attained was, that a bequest of freedom, dependent upon the election of the slaves to be free, is void, because slaves have no legal capacity to make the election. To the learned arguments of the counsel, and

the able opinion of Daniel, J., in that case, we are chiefly indebted for the line of argument above presented. On that occasion, the question seems to have received for the first time the deliberate consideration which its great importance demands; and under these circumstances, the opinion pronounced is fairly entitled to outweigh a score of cases on the opposite side, where the point seems to have been rather taken for granted, than expressly decided.—See, also, *Williamson v. Coulter*, 14 Gratt. 394.

It is said, however, that the trust in this case is not dependent on the election of the slaves to be free, but is perfect without it; that the election which they are authorized to make, is the election to remain in slavery; and that this is prescribed, not as a necessary step in the execution of the trust, but as a condition by which it may be defeated. The argument is, that the testator first creates a valid trust, by directing his executor to remove the slaves for the purpose of emancipating them, and then provides, as the condition which shall defeat it, the election of the slaves to remain in slavery. As slaves cannot, by any voluntary act of theirs, defeat a complete, any more than they can perfect an incomplete trust, it would follow, if this view of the will is correct, that the condition would be void, because impossible, and the trust would stand unaffected by it.

We will not inquire, whether, taking the whole will together, it does not appear that the election of the slaves to be free, is an act essential to the execution of the trust in the manner prescribed by the testator.—See *Williamson v. Coulter*, 14 Gratt. 394. For, however that may be, it is obvious that the trust is made to depend on the election by the slaves of the place to which they are to be removed. The direction is, that the executor shall have them “taken to some non-slaveholding State, or to the republic of Liberia, as the said slaves may prefer.” In trusts of this character, the rule *cy pres* is not adopted or applied; and until the slaves are carried, in execution of the trust, to the State or country to which the will directs them

to be carried, they do not acquire the capacity of free-men, but remain subject to the disabilities of slaves.—Hooper v. Hooper, 32 Ala. 673.

If the direction is for the removal of the slaves to a particular State, and the execution of the provision becomes impossible, from the refusal of such State to admit free negroes within its limits, the bequest fails.—Nancy v. Wright, 9 Humph. 597; Adams v. Bass, 18 Geo. 130. The effect of this will is, that the executor is to take the slaves to that one of two named places which they may select. Unless they make the selection, the direction fails. Unless the executor takes the slaves to a place selected by them, he does not take them to the place directed by the testator. The trust cannot be executed, in the manner provided by the will, unless the executor consults with the slaves, and is governed, as a matter of legal duty, by their will. As their election of the place to which they shall be taken is a condition, the performance of which is essential to the execution of the trust in their favor, the making of that choice is as much a civil act as an election between freedom and slavery. The case of Cleland v. Waters, (19 Geo. 35,) proceeds upon the idea, that in principle there is no difference between the capacity of slaves to choose the place to which they shall be taken, and their capacity to elect whether they will remain slaves or be emancipated. We can perceive no distinction. As the trust cannot be executed, according to the directions of the testator, unless this condition (the selection by the slaves of the place to which they shall be removed) is performed, and as the condition is one which slaves are legally incapable of performing, the trust is void.

Decree affirmed.

GARLINGTON vs. JONES.

[MOTION TO ESTABLISH BILL OF EXCEPTIONS.]

1. *Contents of bill of exceptions.*—Where written documents are mentioned in the bill of exceptions, as constituting a part of it, but are neither copied into it, nor described by such identifying features as to leave no room for mistakes in the transcribing officer, they cannot be regarded as a part of the bill.
2. *Practice on motion to establish bill of exceptions.*—On motion in the appellate court to establish a bill of exceptions, which the presiding judge of the primary court failed or refused to sign, (Code, §§ 2354-56,) the point, decision, and facts, as a whole, must be correctly stated in the bill; and if written documents are referred to in the bill, as constituting a part of it, but are neither copied into it, nor sufficiently identified to be regarded as part of it, it cannot be established.

FROM the Circuit Court of Chambers.

Tried before the Hon NAT. COOK.

IN this case, the appellant's counsel made a motion to establish a bill of exceptions, which the circuit judge had failed to sign within the time required by law; and submitted, with the motion, several affidavits as to the correctness of the bill tendered; while counter affidavits were submitted on the part of the appellees, denying its correctness. The following are extracts from the bill: "On the trial of this cause, the plaintiff read in evidence to the jury a note, as follows: (Here insert the note.)" "The defendants then read in evidence the interrogatories and answers of B. F. Reynolds, as follows. (Here copy the first set of Reynolds' interrogatories and answers.)" "Plaintiff moved to suppress the deposition of said witness, on the ground that defendants had taken his deposition a second time, which second deposition is as follows. (Here copy the interrogatories and answers.)" "The defendants read in evidence the interrogatories and answers of Henry Cosmer, as follows. (Here insert the interrogatories and answers of the witness.)" "The de-

fendants asked the court to give the following ten charges, each of which the court gave. (Here copy the ten charges given at the instance of the defendant.)" The documents referred to are not copied into the bill, nor is any other description of them given.

J. FALKNER, and D. CLOPTON, for the motion.

W. P. CHILTON, and S. F. RICE, *contra*.

STONE, J.—[March 16, 1861.]—Several papers are mentioned in the bill of exceptions, as constituting a part of it, which are not copied into it; nor are they described by such identifying features as to "leave no room for mistakes in the transcribing officer." Under these circumstances, those papers could not be regarded as part of the bill of exceptions.—Bradley v. Address, 30 Ala. 80; Looney v. Bush, Minor, 413; Quigley v. Campbell, 12 Ala. 58; Branch Bank v. Moseley, 19 Ala. 222; Stodder v. Grant, 28 Ala. 416.

[2.] This being the case; we are not enabled to *know*, and to affirm *as a fact*, that, on each point presented for revision, the bill of exceptions tendered truly states "the point, charge, opinion or decision, wherein the court is supposed to" [have erred], "with such statement of the facts as is necessary to make it intelligible."—Code, § 2354. To put the judge in fault, for refusing to sign the bill of exceptions, the facts presented must, *as a whole*, be correctly stated. It is not enough that, by striking out a part, the judge could truthfully have signed and certified the balance. This was addressed to his discretion. The question coming before us in the form in which it does, we have no authority to establish the bill of exceptions, unless the *point*, *decision*, and *facts*, are proved to us to have been truly presented to the circuit judge; not in part, but as a whole. Anything short of this, is not a true statement of the points and decisions sought to be reviewed.

Motion refused.

WILLIAMS vs. IVEY.

[ACTION FOR ASSAULT AND BATTERY AND FALSE IMPRISONMENT.]

1. *Distinction between counts in trespass and case.*—The forms of complaint prescribed in the Code, (p. 554,) "for assault and battery," and "for false imprisonment," are both in trespass.
2. *Relevancy of evidence in trespass.*—In trespass for an assault and battery, and for false imprisonment, evidence of an arrest and imprisonment without legal process, or under legal process which is void on its face, is relevant and admissible; *secus*, as to evidence of an arrest and imprisonment under process which is not void on its face.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THE original complaint in this case was in these words :

"Reason Williams
 vs.
 Samuel Ivey. } The plaintiff claims of the de-
 } fendant twenty thousand dollars,
 as damages for an assault and battery committed by the
 defendant on the plaintiff, viz., on the 10th January, A.
 D. 1858.

"The plaintiff claims of the defendant twenty thousand dollars, as damages for maliciously, and without probable cause therefor, arresting and imprisoning him, the said plaintiff, on a charge of larceny, for twenty days, viz., on the 10th January, A. D. 1858. Wherefore he brings this suit."

The defendant demurred to the complaint, for a misjoinder of counts, and the court sustained the demurrer; holding, that the first count was in trespass, and the second in case. The plaintiff then amended his complaint, by striking out the first count; and a trial was had before a jury, on issue joined on the plea of not guilty to the second count.

During the trial, as the bill of exceptions shows, the plaintiff proved, in substance, that, on the day specified

in the complaint, he and his son, Elijah Williams, while riding through the swamp, were stopped by the defendant, who was accompanied and assisted by a white man and two negroes, were forcibly seized and tied, after a severe struggle, and were carried before a justice of the peace, before whom the defendant preferred against them a charge of stealing his hogs, and had a warrant issued for their arrest and imprisonment; and he then proposed to prove the proceedings which were afterwards had under the warrant, up to the time of his discharge. The court excluded this evidence, because the affidavit and warrant of arrest were not produced; and after the plaintiff had closed his evidence, (the defendant adducing no evidence,) the court excluded from the jury, as irrelevant, all the evidence which the plaintiff had introduced; to which several rulings of the court the plaintiff excepted.

The sustaining of the demurrer to the complaint, and the rulings of the court on the evidence, are now assigned as error.

J. KEISTER, for the appellant, cited *Sturdevant v. Gaines*, 5 Ala. 435; *Ragsdale v. Bowles*, 16 Ala. 62; *Sheppard v. Furniss*, 19 Ala. 760.

BAINES & NESMITH, *contra*, cited 1 Chitty's Pleadings, m. pp. 134, 202; 1 Chitty's Practice, 48; *Stallings v. Newman*, 26 Ala. 300.

STONE, J.—[April 9, 1861.]—The first count in the original complaint is a substantial copy of the form furnished by the Code, (page 554,) "for assault and battery," and is clearly a count in trespass. The second count is a copy of the next succeeding form, the caption of which assumes to be "for false imprisonment." The correctness of the ruling of the circuit court, on the demurrer for misjoinder, depends on the inquiry, whether the second count is in trespass, or in case. The circuit court held it to be a count in case. We hold, that it was a count in trespass *vi et armis*, for the following reasons:

First—The caption to the form, for false imprisonment,

indicates the action of trespass, (2 Chitty's Pl. m. p. 857,) and is a very inappropriate designation of *an action on the case for a malicious prosecution*.—2 Chitty's Pl. m. p. 600.

Second—The court contains no words descriptive of an arrest under process, or of discharge therefrom, which are essential in a complaint for a malicious prosecution. *Ragsdale v. Bowles*, 16 Ala. 62; *Sheppard v. Furniss*, 19 Ala. 760.

In the two cases cited *supra*, from 16th and 19th Ala., the declarations contained clearer marks of the action for malicious prosecution, than the second count in the present complaint does; yet this court ruled each of those counts to be in trespass.

In the trial of the cause, the circuit court proceeded on the opinion, that the second count in the complaint, on which the trial was had, was a count in case. Hence, that court excluded much evidence of assault and battery, imprisonment without process, &c., which was legal evidence in an action of trespass *vi et armis*. This ruling of the court being based on an erroneous judgment as to the form of action, it results that the circuit court erred in this particular. We need scarcely add, that on a trial in *trespass for an assault and battery, and for false imprisonment*, testimony of a prosecution under warrant and arrest, which are not void on their face, is not relevant.—*Duckworth v. Johnson*, 7 Ala. 578; *Crosby v. Hawthorn*, 25 Ala. 221.

Reversed and remanded.

STEELE & BURGESS vs. TOWNSEND.

[ACTION BY COMMON CARRIER FOR FREIGHT—RECOURSEMENT OF DAMAGE TO GOODS.]

1. *Liability of common carrier for negligence.*—A common carrier cannot limit his common-law liability by any general notice, but may so limit it by a special contract with the shipper; and a bill of lading, given by the carrier on the receipt of the goods, and accepted by the shipper, is a special contract within the meaning of this rule; yet such special contract cannot be pleaded by the carrier, as an exemption from liability for any loss or damage resulting from his own negligence.
2. *Relevancy of evidence on question of negligence by common carrier.*—In an action against a common carrier, to recover damages for injuries to goods shipped by sea, (or where the same matter is relied on as a defense against an action by him to recover freight,) the fact that similar goods, shipped by sea to the port of delivery, usually arrived safe and uninjured, would be admissible evidence against him, as a circumstance tending to show that any damage by breakage was the result of negligence on his part; and *conversely*, the fact that such goods usually arrived in a damaged and broken condition, is admissible evidence for him, as tending to show that the breakage was not the result of negligence on his part. (Explaining and limiting first head-note in *O'Grady v. Julian*, 84 Ala. 88.)
3. *Burden of proof on question of negligence by common carrier.*—Where the bill of lading contains an express stipulation, that the carrier is "not accountable for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima-facie* case of negligence against him; and the *onus* is then on him to show the exercise of due care and vigilance on his part to prevent the injury; unless the nature of the injury, or of the goods, of itself furnishes evidence that due care and diligence could not have prevented the injury.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAFFER.

THIS action was brought by the appellee, to recover of the appellants \$82 32, "for freight, primage and aver-

age, due from said defendants to plaintiff, upon, for, and in respect of the conveyance of divers goods, merchandize and chattels, on board the plaintiff's schooner *R. W. Tull*, from the port of Philadelphia to the port of Mobile;" and the complaint also contained a count for work and labor, and a count on an account stated. The defendants pleaded, "in short by consent, payment, set-off, and non-assumpsit." On the trial, as the bill of exceptions shows, the plaintiff read in evidence the bills of lading for the goods, which contained a clause in these words, "Not accountable for rust or breakage;" and proved the delivery of the goods to the defendants in Mobile, and the value of the freight. The goods consisted of stoves, kettles, pots, pans, &c. "The plaintiff introduced evidence, also, that the goods were well stowed, and were not broken or damaged in discharging them, and that proper care and skill were employed in discharging them from the vessel; also, that his witnesses had never seen like goods better stowed. The defendants' evidence tended to show, that the cast-iron ware, stoves, &c., were much broken upon the vessel, and upon the wharf, and before the delivery to the defendant's drays; that the breakage of the goods was equal to the amount of the freight claimed; and that some of the breakage, as appeared by the fractures, was very recent, and seemed as if it had been done within an hour. One witness, who had much experience in the business of receiving like wares shipped from northern ports, testified, that he had never seen a shipment of stoves so badly broken; while other witnesses, also experienced, testified, that there was not more breakage than usual in such shipments. The plaintiff offered evidence tending to show, that shipments of cast-iron and hollow ware, especially stoves, coming to Mobile upon vessels by sea, were usually in a damaged and broken condition on their arrival. The defendants objected to this evidence, and excepted to its admission against their objection. The plaintiff offered evidence, also, without objection, to show that stoves were especially brittle, and liable to damage and breakage; and it

was also proved, that such wares, unless carefully handled, were liable to break, no matter how well stowed. It was in evidence, also, that the plaintiff was master of the vessel, a common carrier, on which the goods were shipped; but there was no evidence to show any special contract for the carriage of the goods, other than the bills of lading, which were admitted to be genuine."

"The court thereupon charged the jury, (among other things,) that if the goods mentioned in the bills of lading were of a brittle nature, and very liable to rust and breakage in the transportation and handling, then the exception in the bills of lading, 'not accountable for rust or breakage,' was, to some extent, valid in favor of the plaintiff: that, notwithstanding that clause in the bills of lading, the plaintiff was bound to use the highest degree of diligence, according to the nature of the goods, to avoid damage to them; but, that if, after using such diligence, and taking the greatest care, they were broken without any neglect or want of care on his part, then, under his bills of lading, he would not be liable in damage for such breakage, nor would the same be a defense or bar to his right to recover freight.

"The defendants excepted to this charge, and then asked the court to charge the jury—'1st, that if there was no other evidence of a special contract or agreement, than the words 'not accountable for rust or breakage' in the bills of lading, these words did not show such a special contract between the carrier and the shipper as would limit the responsibility of the former as to breakage; 2d, that if the goods were in good order when received by the plaintiff in Philadelphia, and in bad order when landed in Mobile, the plaintiff could only discharge himself by showing that he had not been negligent, and had taken that care which the nature of the articles required, from the time he received them in good order in Philadelphia, until he delivered them to the defendants in Mobile.' The court refused to give these charges as asked, and the defendants excepted to their refusal; but the court did give the second charge, after inserting the

word *unusually* before the words *bad order*; to which qualification the defendant also excepted."

The several rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

R. B. ARMISTEAD, for appellants.—1. The circuit court erred in the admission of the evidence excepted to. *O'Grady v. Julian*, 34 Ala. 88; *Gilmer v. City Council*, 26 Ala. 665; *Hubbard v. Railroad Co.*, 89 Maine. 506, and cases cited.

2. It has been generally held in this country, that a common carrier cannot limit his responsibility by a general notice, but may so limit it by a special contract. 1 *Smith's Leading Cases*, 325-6; 1 *Parsons on Maritime Law*, 177; 19 *Wendell*, 234; 9 *Watts*, 87; 5 *Rawle*, 179; 6 *How. U. S.* 344-82; 2 *Kelly*, 349; 16 *B. Monroe*, 648; 2 *Kent's Com.* (9th ed.) 820, and note. The insertion of a particular clause in the bill of lading, which is the act of the carrier himself, does not amount to a special contract, unless the assent of the shipper is clearly shown. 1 *Newberry's Adm.* 464; 6 *Johns.* 170-80; 6 *How.* 382.

3. If the carrier received the goods in good order, and delivered them in bad order, the *onus* was on him to excuse himself by proof of due care and diligence.—1 *Newberry's Adm.* 464, 505; 9 *Rich.* 201; 12 *Howard*, 272-80.

A. R. MANNING, *contra*.—1. A common carrier may, by special contract with the shipper, limit his responsibility; and the bill of lading is the proper evidence of such special contract.—*Angell on Carriers*, §§ 220, 221, 223, 225, 233, 159, 166; *Edwards on Bailments*, 468; 6 *How. U. S.* 382; 1 *Kernan*, 486, 491-2; 4 *Sandf.* 141; 4 *Taunton*, 126; 6 *Porter*, 131; 31 *Ala.* 506.

2. It being shown that the damage to the goods resulted from the cause specially excepted, the *onus* is on the shipper to show negligence on the part of the carrier.—*Angell on Carriers*, §§ 61, 276; *Story on Bailments*, § 573; 5 *B. & Cr.* 326; 11 *Metcalf*, 461; 28 *Ala.* 412; 34 *Ala.* 174.

3. The evidence objected to was relevant and proper. *Donnell v. Jones*, 17 Ala. 695; *Ingram v. Lawson*, 37 Eng. Com. L. 350.

R. W. WALKER, J.—[March 1st, 1861.]—1. Whatever doubts may at one time have been entertained on the subject, it is now well settled, that, although a common carrier cannot limit the liability which the common law devolves on him by any general notice, he may do so by special contract with the shipper.—*Dorr v. N. J. Steam Nav. Co.*, 1 Kernan, 490-91; S. C., 4 Sandf. Sup. Ct. R. 141-2; *N. J. Steam Nav. Co. v. Merchants' Bank*, 6 Howard, 382; *Ang. Carriers*, §§ 220, 221, 225, 233; 1 *Parsons on Contr.* 203-4. And it seems to be considered, that a bill of lading, given by the carrier on receipt of the goods, and accepted by the shipper, is a special contract between the parties, within the meaning of this rule.—*Dorr v. N. J. Steam Nav. Co.*, 1 Kernan, 486, 491; *Edwards on Bailments*, 468; *Swindler v. Hilliard*, 2 Richardson, 303; *Story on Bailments*, § 550. Yet such contract, limiting his common-law responsibility, cannot be pleaded by the carrier as an exemption for any loss or damage resulting from his own negligence.—*N. J. Steam Nav. Co. v. Merchants' Bank*, 6 Howard, 144; *Dorr v. Steam Nav. Co.*, 4 Sandf. 136; *Swindler v. Hilliard*, 2 Rich. L. 286; *Baker v. Brinson*, 9 Rich. L. 201; *Davidson v. Graham*, 2 Ohio St. R. 131; *Graham v. Davis*, 4 Ohio St. R. 362; *Merriman v. Brig Mary Queen*, 1 Newb. Adm. R. 464; 1 *Parsons' Mar. L.* 179, *note*.

2. As the exception contained in the contract did not have the effect of relieving the plaintiff from liability for any "breakage" which was the result of his negligence, it follows, that evidence tending to show that the breakage complained of was not the result of the plaintiff's negligence, was admissible in his behalf; and we hold, that, for this purpose, it was competent for the plaintiff to show, that articles similar to those specified in the bill of lading, coming to Mobile upon vessels by sea, were usually in a damaged and broken condition on their arri-

val. If such articles, when shipped by sea, usually arrived uninjured, this would be a circumstance tending to show that the "breakage," when any did occur, was the result of negligence on the part of the carrier. The contrary proof would have a contrary tendency.—See *Ingram v. Lawson*, 37 Eng. Comm. L. R. 350-1; *Donnell v. Jones*, 17 Ala. 690, 695.

The decision of this court in *O'Grady v. Julian*, (34 Ala. 88,) is relied on by the counsel for appellant, as in conflict with the opinion here expressed. It is possible that, in the case just cited, the court may have placed an improper construction upon the language of the bill of exceptions. But the evidence which was there held to be inadmissible, was understood by the court as relating to the usual profits made by *particular* establishments in the neighborhood, and not as referring to the average *per-centage* of profit realized by similar establishments in the neighborhood. The decision was intended to apply, and must be confined, to cases in which it is proposed to prove the profits of particular establishments—that is, to take individual instances, and prove the usual profits of each,—the effect of permitting which would be, to nullify the issues indefinitely.

3. The difficult point in the case arises upon the charge which was asked by the defendants, and which the court refused to give.

In reference to special agreements, limiting the carrier's responsibility, Nelson, J., in delivering the opinion in *New Jersey Steam Nav. Co. v. Merchants' Bank*, (6 Howard U. S. 384,) uses this language: "The owner of goods, by entering into the contract, virtually agrees that, in respect to the particular transaction, the carrier is not regarded as in the exercise of his public employment, but as a private person who incurs no responsibility beyond that of a bailee for hire, and answerable only for misconduct or negligence."—See, also, 4 Sandf. Sup. C. R. 145; 1 Kernan, 493. And it has been held on several occasions, that, although a special contract, qualifying a carrier's responsibility, does not exempt him from liability

for loss resulting from his negligence; yet that, in such case, the burden of proving negligence is on the shipper. Authorities *supra*; Clark v. Barnwell, 12 Howard U. S. 280; Hunt v. The Cleaveland, 6 McLean, 26; S. C., 1 Newb. 222-8; Brig. Mary Queen, 1 Newb. 464; see 1 Parsons' Mar. Law, 150-1; Ang. Carr. §§ 61, 276.

On the other hand, and in cases in which the question received the most thorough consideration, it has been decided, that where there is a special contract, limiting the carrier's responsibility, the *onus* of showing, not only that the cause of the loss was within the terms of the exception, but also that there was no negligence, is on the carrier.—Swindler v. Hilliard, 2 Rich. L. R. 286; Baker v. Brinson, 9 Rich. L. 201; Davidson v. Graham, 2 Ohio St. R. 131; Graham v. Davis, 4 Ohio St. R. 362; Camden & Amboy R. R. Co. v. Baldauf, 16 Penns. St. R. 67; 2 Greenl. Ev. § 219.

Without adopting this rule in the terms in which it is here stated, we think it is so far true in the present case, that an injury by "breakage" to the articles shipped, is not brought within the terms of the exception, unless it is also shown that the "breakage" was not the result of the negligence of the carrier. In other words, the exception includes only such breakage as care and diligence could not prevent; and the injury is not within the exception, until it is shown that it occurred notwithstanding the exercise of such care and diligence. It is not strictly accurate to say, that the *onus* is on the carrier to show, not only that the cause of loss was within the exception, but also that he exercised due care. The correct view is, that the loss is not brought within the exception, unless it appears to have occurred without negligence on the part of the carrier; and, as it is for the carrier to bring himself within the exception, he must make at least a *prima-facie* showing that the injury was not caused by his neglect.

It is a mistake to suppose that, by the insertion of such an exception as is found in this bill of lading, the character of the employment is changed. The party receiving

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the goods still remains, notwithstanding this feature of the contract, a common carrier: his liability only, to the extent of the exception, is diminished. "In all things else, the very same principles apply. Care and diligence are still elements of the contract, and 'strict proof' is properly required, before any exemption may be claimed." 9 Rich. 203.

In most cases of bailment, the bailee is chargeable, not by the delivery of the goods, but by reason of negligence. Hence, in the case of ordinary bailments, the general rule is, that to hold the bailee responsible, negligence must be alleged and proved; though some courts have considered that the bailee should be held to proof of the facts and circumstances under which the loss occurred.—Clarke v. Spence, 10 Watts' R. 335; Logan v. Mathews, 6 Barr, 417; Swindler v. Hilliard, 2 Rich. L. 305-6. But in relation to common carriers, the rule is, that, in all cases of loss, the *onus probandi* is on the carrier to exempt himself from liability; for *prima facie*, the law imposes the obligation of safety upon him. Consequently, the owner is bound to prove no more than that the goods were delivered to the carrier, and that the latter had not delivered them to the consignee. These facts constitute *prima-facie* evidence of negligence or misconduct.—Angell Carr. § 202; Story Bailm. § 529.

By the common law, the carrier is responsible for all losses, except such as result from the act of God, or the public enemy. Hence, his liability is not confined to such losses as are the consequences of his own negligence, or want of skill. He is liable for losses by accident, mistake, and numerous unavoidable occurrences, not falling under the head of acts of God or the public enemy, and against which it is not within the reach of human vigilance or foresight to provide. For losses occasioned by the wrongful acts of third persons, by accidental fires, by robbery, or by the violence of mobs, which neither the carrier nor his agents can resist, or by any vigilance avoid, he is responsible:—1 Smith's L. C. 315; 2 Ohio St. R. 187. The liabilities of a common carrier are thus dis-

tinguished into two classes: the one, a liability for losses by neglect, which is the liability of a bailee; the other, a liability for losses by accident, or other unavoidable occurrence, which is the liability of an insurer. In *Riley v. Horne*, (5 Bing. R. 217,) Best, C. J., uses this language: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner; he seldom follows, or sends any servant with them, to the place of their destination. If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, or by thieves in collusion with them, the owner would be unable to prove either of these causes of loss. His witnesses must be the carrier's servants; and they, knowing that they could not be contradicted, would excuse their masters and themselves. To give due security to property, the law has therefore added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward—namely, that of taking *all reasonable care of it*—the responsibility of an insurer. From his liability as an insurer, the carrier is only to be relieved by two things, both so well known to all the country when they happen, that no person would be so rash as to attempt to prove that they had happened when they had not; namely, the act of God, and of the king's enemies."

On grounds of public policy, the courts have manifested a disposition to construe any new exceptions to the liability of a common carrier, strictly against him.—*Atwood v. Transportation Company*, 9 Watts, 87. Without the exception, the carrier would be liable as an insurer, for a loss from the specified cause; and the only legitimate effect of the exception is, to relieve the carrier from this extraordinary responsibility for a loss which could not have been prevented by proper care and diligence on his part. When, therefore, a carrier, as in this case, provides against accountability for "rust or breakage," the proper construction of the exception is, that the carrier is not to be held liable as an insurer for "rust or breakage" which occurs without negligence on his part; but

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that he remains, as before, responsible for any injury of the kind mentioned, if caused by his failure to exercise the degree of care which the law demands of every common carrier, in respect of the goods committed to him. The making of such exception does not change the character of the employment, or the rules of evidence before applicable to the subject. Hence, a *prima-facie* case of negligence is made out against the carrier, by showing that the goods were delivered to him, and that he has either not delivered them at all, or has delivered them in an injured condition.

Where a carrier seeks to bring a loss within the common-law exception of "an act of God," he cannot throw upon the employer the burden of proving or inferring negligence or defective means in the carrier, until he has shown the intervention of such an extraordinary, violent and destructive agent, as by its very nature raises a presumption that no human means could resist its effect.—1 Smith's L. C. (5th Am. ed.) 318; Coosa R. Co. v. Barclay, 30 Ala. 128-9; Steele v. McTyer, 31 Ala. 676. "The true view is, not that the carrier discharges his liability by showing an act of God, and is then responsible, as an ordinary agent, for negligence; but that the intervention of negligence breaks the carrier's line of defense, by showing that the injury or loss was not directly caused by the act of God, or, more correctly speaking, was not the act of God."—1 Smith's L. C. 319.

In like manner, the exception of "perils of the sea," and "dangers of the river," means such as cannot be avoided by the exercise of that discretion and care, which the law requires of common carriers; and to ascertain whether a loss falls within the exception, it must be inquired, whether the accident could have been prevented by the exercise of proper foresight and diligence.—1 Smith's L. C. 316; Williams v. Branson, 1 Murphy, 417; Marsh & Houren v. Blithe, 1 N. & McC. 170; Jones v. Pitcher, 3 St. & P. 136, 171. Thus, where goods were received on board a steamboat, and the bill of lading contained an exception of "dangers of the river;" and

the loss was occasioned by the boat's striking on a sunken rock; it was held incumbent on the carrier to prove that due diligence and proper skill were used to avoid the accident.—*Whiteside v. Russell*, 8 W. & S. 44.

The same principle must apply to the present exception. The proof of injury makes a *prima-facie* case of negligence against the carrier; and he does not bring the injury within the exception, until he shows the exercise of due vigilance on his part to prevent the injury; unless, indeed, the nature of the injury, or of the property, be such as to furnish, of itself, evidence that due care and diligence could not have prevented the injury.

There is no hardship in such a rule, and many strong reasons unite to commend it to our approval. It is of the utmost importance to the commerce of the country, that carriers should be held to a strict accountability. On this subject, we concur in the remark of Chief-Justice Gibson, that, "though it is, perhaps, too late to say, that a carrier may not accept his charge in special terms, it is not too late to say, that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them."—9 Watts, 87. This is especially so in reference to exceptions inserted in bills of lading. Goods are commonly sent by the owner to the carrier's place of business, where they are received, and the bill of lading made out by the carrier, or his clerk. It is often not seen by the owner, until it is too late to insist on a change in the terms. These considerations have induced one eminent judge to say, that the better rule, perhaps, would be to treat all such provisions in bills of lading as void, unless inserted by the express consent of the employer. Black, C. J., in *Chouteaux v. Leach*, 18 Penn. 283.

One result of the introduction of steamboats and railroads is, that common carriers have, to a great extent, taken exclusive possession of the public thoroughfares of the country, and have it in their power to impose their own terms upon the owners of goods, who, indeed, have no choice but to employ them. The owner accepts th

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conditional bill of lading, because he cannot well help it. He must have his goods carried, and he sees that the carrier will refuse to take them, unless the prescribed terms are accepted. The owner seldom accompanies his property, and, in case of loss or injury, however gross the negligence may be, is unable to prove it, without relying upon the servants of the carrier,—the very persons, generally, by whose negligence (if there was negligence) the goods have been lost; whose feelings, wishes, and interests, are all against the owner, and who are, as a general rule, only too ready to exculpate themselves and their employer. Of the manner of the loss, the owner is, generally, entirely ignorant, while the carrier and his servants may be reasonably supposed to be fully advised in regard to it; and “that is a sound rule, which devolves the *onus* on him who best knows what the facts are.”

The result of what has been said is, that if the goods were in good order when received by the plaintiff in Philadelphia, and in bad order from “breakage” when delivered in Mobile, it devolved upon the carrier to show, that proper diligence and skill were exercised to prevent the injury; unless, as before remarked, it appears that the nature of the injury, or of the property, is such as to show, of itself, that due care and diligence could not have prevented the injury. The charge asked should have been given.

Judgment reversed, and cause remanded.

McGEHEE vs. MAHONE.

[DETINUE FOR SLAVES,]

1. *Admissibility of subsequent declarations explanatory of admissions.*—Plaintiff having proved, that the slaves in controversy were not included by the defendant in the schedule of his taxable property,

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which was rendered to the assessor on oath, and were included in the schedule of the plaintiff's property, which was given in at the same time by his son, in the defendant's presence; the defendant cannot be allowed, for the purpose of rebutting the presumption arising from this evidence, to prove that he afterwards corrected his schedule, and what reasons he then assigned to the assessor for his former conduct; and the fact that, when first giving in his schedule, "he asked leave of the assessor to correct any mistake, and said something about getting advice," does not affect the principle.

2. *Admissibility of party's declarations as evidence for him.*—The declarations of a party are, *prima facie*, not admissible evidence for him; and the fact that a witness, when cross-examined, "for the sole purpose of contradicting him," touching his own declarations at a particular time and place, states "that he cannot answer the question without giving the declarations of the defendant made at the same time," is not, of itself, sufficient to show error in the exclusion of the defendant's declarations.

3. *Bailor's right to terminate bailment.*—If the bailor of slaves, when delivering possession to the bailee, declares that he gives or lends them to her, "but subject to his call at any time," his right to terminate the bailment, and reclaim the slaves, is not necessarily limited to the life-time of the bailee.

APPEAL from the Circuit Court of Butler.

Tried before the Hon N. T. Cook.

THIS action was brought by Thomas Mahone, against Augustus McGehee, to recover several slaves, together with damages for their detention. It appeared from the evidence on the trial, that the slaves had once belonged to the plaintiff, and had been either given or loaned by him to his daughter, who married the defendant in April, 1856, and died about one year afterwards, leaving an infant child, who also died before the commencement of the suit. The defendant's evidence conduced to show, that the plaintiff gave the slaves to his daughter, by parol, some time before her marriage, and afterwards retained them, under a contract of hiring, until the close of the year 1856, when he sent them to the defendant's house; while the plaintiff's evidence tended to show, that he delivered the slaves to the defendant, after his marriage with plaintiff's daughter, under a loan or bailment, and de-

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clared at the time, "that he gave or loaned them to defendant's wife, but subject to his call at any time."

"The plaintiff proved, that, after the death of the defendant's wife, his son and the defendant went together to the tax-assessor, to give in their taxes, and had some conversation between them as to giving in the slaves in controversy; that the defendant did not give in said negroes to the assessor as his property, and swore to his schedule of taxable property; that said negroes were given in at the same time by plaintiff's son, in defendant's presence, as the property of the plaintiff; and that the defendant remarked, when he gave in his list, that he had intended to give in said negroes, but that plaintiff's son had relieved him of that. It was further shown, that defendant and plaintiff's son then left the assessor, and went home, and did not again return together to the assessor. It was shown, however, that the defendant, at the time of giving in his taxes, asked leave of the assessor to correct any mistake, and said something about getting advice. To rebut the presumption arising from his failure thus to give in said slaves to the assessor, the defendant offered to prove, by the assessor, that on the same day he gave in his taxes, but on another occasion, he corrected his tax-list, by giving in said slaves as his own. The court rejected this evidence, at the instance of the plaintiff, and the defendant excepted. The defendant further offered to prove, for the purpose of rebutting the said presumption, that he said to the assessor as aforesaid, (the plaintiff not being present,) that the reason why he did not give in said negroes in the first instance, and asked leave to correct his list, was, that he wished to see one Morrison, (who had heard plaintiff say, before his daughter married the defendant, that said negroes were the property of his daughter, and that he was paying hire for them,) that he had seen said Morrison, and that Morrison had stated what plaintiff had said about the negroes. The court refused to permit this proof to be made, and the defendant excepted."

"The plaintiff introduced one William F. Mahone as a

witness, who testified to declarations of the defendant, after the death of his wife, as to the ownership of the said negroes, and in disparagement of his title, made on the day of giving in the tax-list. On cross-examination of said witness, and for the sole purpose of contradicting him, the defendant proposed to ask him, what he (said witness) had said to one Morrison, at said Morrison's store, three or four days after the tax-list was made, as to the declarations of the defendant he had proved on the day of giving in their taxes; and the court said, that the question might be asked. The witness stated, that he could not answer the question, without giving the declarations made at that time by the defendant, who was present with him and Morrison; and the court said, that the declarations of the defendant could not be given; to which the defendant excepted."

"The defendant asked the court to charge the jury, that if they found, from the evidence, that there was no valid gift of the slaves before the marriage of plaintiff's daughter with defendant; and that the plaintiff said to the defendant, at the time the negroes were delivered into the defendant's possession, that he gave or loaned them to defendant's wife, but subject to his call at any time; and that he never did call for them, or make them subject to his order, during the life-time of the defendant's wife,—then the plaintiff could not recover in this action." The court refused this charge, and the defendant excepted to its refusal.

The rulings of the court on the evidence, and the refusal of the charge asked, are now assigned as error.

WATTS, JUDGE & JACKSON, for appellant.—1. The case of *Traun v. Keiffer and Wife*, (31 Ala. 136,) is conclusive on the first two assignments of error. *Pearsall v. McCartney*, (28 Ala. 110,) cited for the appellee, is opposed to the current of authority.—1 Dan. Ch. Pr. 455, note 1; 1 Phil. Ev. 359; 1 Paige, 124.

2. The proper predicate was laid to impeach the witness Mahone; and if his declarations were competent

evidence for that purpose, the declarations of the defendant, constituting a part of the same conversation, thereby became competent also. The declarations of defendant, in such case, stand on the same footing with the declarations of third persons, which are always received, though mere hearsay; and to exclude such declarations, whether made by a party or by a third person, would, in most cases, deny the right to impeach a witness by proof of contradictory statements.

D. W. BAINE, with GOLDTHWAITE, RICE & SEMPLE, *contra*.

1. The corrected tax-list was the best evidence to prove the correction, and should have been produced, or its absence accounted for, before the same fact could be proved by the assessor.—*Smith v. Armistead*, 7 Ala. 698; *Cole v. Spann*, 13 Ala. 537; *Ware v. Roberson*, 18 Ala. 105.

2. The defendant's subsequent declarations to the assessor, formed no part of the transaction proved by the plaintiff, and were not made in the plaintiff's presence. *Stewart v. Sherman*, 5 Conn. 244; *Ogden v. Peters*, 15 Barb. 562; *Roberts v. Trawick*, 22 Ala. 493; *Smith v. Cureton*, 31 Ala. 652. That the defendant, when giving in his tax-list, asked or reserved the right to correct mistakes, makes no difference in the application of the principle; he had the right to correct mistakes, without such reservation. The case of an original and amended bill in chancery is analogous.—*Pearsall v. McCartney*, 28 Ala. 110.

3. The proper question was not asked to impeach the witness Mahone.—1 Greenl. Ev. 514. If the question had been proper, *non constat* that the defendant was injured by the ruling of the court, since the record does not show that the declarations of the witness were excluded. The declarations of the defendant were, at least *prima facie*, incompetent evidence for him; and it was incumbent on him to show some special circumstances which justified their admission.

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cannot counteract admissions, proved to have been made by him, by evidence of posterior declarations, made on a different occasion.—*Pearshall v. McCartney*, 28 Ala. 110, 126; *Roberts v. Trawick*, 22 *ib.* 480-494; *Lee v. Hamilton*, 3 *ib.* 529. The declarations, the exclusion of which is the subject of the second exception, manifestly fall within this rule; and were properly held inadmissible.

But it is claimed that the act, for the rejection of the proof of which the defendant made the first exception named in the bill of exceptions, must be excluded from the operation of that rule. The plaintiff proved, that defendant was present when the plaintiff's son gave in the slaves in controversy, to the tax-assessor, as the taxable property of the plaintiff; and that the defendant did not include the slaves in the list of taxable property rendered by him. It appeared, however, that on that occasion, the defendant said, that he had intended to give in the slaves in controversy as his property, but plaintiff's son had relieved him of that; and, also, that the defendant asked leave of the assessor to correct any mistake, and spoke of getting advice. The defendant proposed to prove that, afterwards, on the same day, he gave in to the assessor the said slaves as his taxable property. If the proposed evidence ought to be excepted from the general rule, it is upon the ground, that the defendant qualified his conduct, and weakened the admission to be argued from it, by saying that he had intended to give in the slaves as his property, but was relieved of it by the plaintiff's son, and asking leave to correct any mistake. That the defendant so qualified and explained his declarations and conduct at the time, as to greatly lessen the weight of the argument against him to be drawn therefrom, cannot justify him in giving in evidence a subsequent act or declaration, adding force to the qualification or explanation already made, or relieving himself from the previous admission. The defendant obtained the advantage and full benefit of his explanation or qualification, in lessening or destroying the influence of the admission. The fact that he asked leave to correct any

mistake, did not entitle him to prove that he subsequently acted differently. Every complainant in chancery files his bill, having a right to correct mistakes in the original bill by an amendment; yet it has been decided, that when an original bill is offered in evidence, in another suit, against the complainant, he cannot counteract the admissions of the original bill, by introducing the amendment. *Pearson v. McCartney*, 28 Ala. 110. If a party makes an admission, with a request of permission to correct any mistake in the admission, the jury are to consider the effect of his request of permission to correct mistakes in determining the weight of the admission, but he cannot be allowed to prove subsequent declarations or acts, for the purpose of relieving himself of the force of the admission.

[2.] The appellant, for the purpose of discrediting his adversary's witness, interrogated him as to declarations made by him (the witness) at a designated time and place, and to a given person. The witness asserted, that he could not answer the question, without giving the declarations of the defendant, who was present at the time when the declarations of the witness were made. The court said, that the declarations of the appellant could not be given in evidence; and to this denial by the court of the admissibility of the appellant's declarations there was an exception. It is clear, that the appellant's declarations were, *prima facie*, inadmissible as evidence for him. It therefore devolved upon him, as a preliminary to their admission, to show how they could be made competent evidence by other facts.—*Shields & Walker v. Henry & Mott*, 31 Ala. 53. The court had nothing before it, tending to relieve those declarations of their inadmissible character, save the single fact, that the witness said he could not answer the question, requiring a statement of the declarations made by himself, unless he also gave the declarations made by the appellant on the same occasion. It might have been, that the appellant's declarations were so intermingled and connected with those of the witness in the same conversation—for example,

in the form of questions by one, and answers by the other—that it would be impossible to understand the declarations of the witness, except when viewed in connection with those of the appellant. But that state of things is not satisfactorily shown, simply by the statement of the witness, that he could not give his own declarations without giving the defendant's. The court, which is the judge of the showing preliminary to the admission of evidence *prima facie* illegal, could not safely or properly act upon such a statement of the witness. In doing so, it would have substituted the judgment of the witness for its own, upon the question, whether the declarations of the appellant and the witness were so connected that the latter would be unintelligible without the former. Besides, the statement of the witness, giving no reason why he could not give his own declarations without those of the appellant, was of such ambiguous and doubtful character, that no inference of the requisite fact could be safely predicated upon it.—*Scott v. Coxe*, 20 Ala. 294; *Humphreys v. Bradford*, 32 Ala. 500. If there were facts, which would have shown the admissibility of the declarations in question, they should have been brought to the notice of the court. Upon the facts disclosed by the bill of exceptions, we cannot affirm that the court erred in deciding that the declarations were inadmissible.

[3.] There was no error in the refusal to charge as requested by the appellant. If the plaintiff accompanied the delivery of the negroes with the declaration, "that he gave or loaned them to the defendant's wife, but subject to his call at any time," his right to terminate the bailment, and reclaim the negroes, would not necessarily be restricted to the life-time of the bailee.

Judgment affirmed.

WILLIAMS vs. IVEY.

[ACTION FOR ASSAULT AND BATTERY AND FALSE IMPRISONMENT.]

1. *Distinction between counts in trespass and case.*—The forms of complaint prescribed in the Code, (p. 554,) "for assault and battery," and "for false imprisonment," are both in trespass.
2. *Amendment of complaint after demurrer sustained.*—Under the Code, (§ 2253,) if plaintiff amend his complaint, after the court has sustained a demurrer to the original, and proceeds to trial on the amended complaint, he does not thereby waive his right to assign as error the judgment on the demurrer, unless the record shows that, in consequence of the amendment, he sustained no injury by that judgment. (Overruling *Sheppard v. Shelton*, 34 Ala. 652, and limiting *Stalkings v. Newman*, 26 Ala. 300, to cases commenced before the Code.)
3. *Error without injury in admission and subsequent withdrawal of evidence.*—The erroneous admission of evidence, which is afterwards withdrawn from the jury, and which they are expressly instructed by the court not to regard for any purpose, is, at most, error without injury.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

This action was brought by Elijah Williams, against Samuel Ivey, to recover damages for an assault and battery, and for false imprisonment. The original complaint contained two counts, which were identical with those in the case of Reason Williams against Ivey, page 198. The circuit court sustained a demurrer to the complaint, for a misjoinder of counts; holding, that the first count was in trespass, and the second in case. The plaintiff then amended his complaint, by striking out the first count; and a trial was had on issue joined on the plea of not guilty to the second count. During the trial, as the bill of exceptions shows, the defendant read in evidence the deposition of one Jordan. The plaintiff moved the court to suppress the answer of this witness

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to the third direct interrogatory, on the ground that it was not responsive to the interrogatory, and reserved an exception to the overruling of his objection. "After the argument to the jury was closed, and the court had charged the jury, the defendant asked leave of the court to withdraw from the jury the answer of the said Jordan to the third direct interrogatory, and the court allowed him to do so; and the court specially instructed the jury, that said answer was withdrawn from them, and was no evidence before them, and that they must not look to said answer as evidence for any purpose; to which action and ruling of the court the plaintiff also excepted." The sustaining of the demurrer to the complaint, the rulings of the court on the evidence, and the refusal of a charge requested by the plaintiff, are the matters now assigned as error.

J. KEISTER, for the appellant.

BAINES & NESMITH, *contra*.

A. J. WALKER, C. J.—[April 12, 1861.]—Both counts of the complaint were in trespass, as was decided by this court in the kindred case of Reason Williams v. Ivey, at the present term. The court erred, therefore, in sustaining the demurrer for misjoinder of counts.

[2.] This error was not waived, by the plaintiff's amending and proceeding to trial. Section 2255 of the Code secures the right of assigning the judgment on demurrer for error in such a case, unless the plaintiff has sustained no injury by the judgment in consequence of the amendment. The decision in Stallings v. Newman, (28 Ala. 300,) was made in a suit commenced on the 8th December, 1851, as we find by consulting the original record; and it was, therefore, not governed by the Code. Besides, in that case, the plaintiff probably sustained no injury from the ruling on the demurrer. Here, we cannot say that the plaintiff has not been injured. There are wrongs which might have been redressed under the second count, and yet could not have been proved under

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the first. The decision in *Sheppard v. Shelton*, 84 Ala. 652, was made upon the authority of *Stallings v. Newman*, our attention not having been called to the provision of the Code above stated; and we do not regard it as a correct statement of the law as it exists since the adoption of the Code.

[3.] If there was any error in the admission of the answer of the witness Jordan to the third direct interrogatory, it was cured by the subsequent withdrawal of that evidence from the jury, and the explicit instruction of the court to the jury, that they must not regard it as evidence, and must not look to it as evidence for any purpose.—See the cases collected in *Shepherd's Digest*, 568, § 88.

The question raised by the refusal of the charge asked, may not again arise, and we do not deem it necessary to pass upon it.

Reversed and remanded.

JACK ET AL. (SLAVES) vs. DORAN'S EXECUTORS.

[STATUTORY SUIT FOR FREEDOM.]

1. *Validity of bequest of freedom to slave.*—In this State, a direct bequest of freedom to slaves is void, unless their emancipation is authorized by some special legislative provision; and where the testator is authorized, by a special statute, to emancipate his slaves at his discretion, but is required, as a condition precedent, previously to convey a certain quantity of land to the judge of the county court, in trust for their use, as a security that they shall not become a public charge, a devise of the land to the slaves themselves, in a will which is not sufficiently attested to pass real estate, is not a substantial compliance with the statute, and the bequest and devise are both void.

APPEAL from the Circuit Court of Jackson.

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The record does not show the name of the presiding judge.

THIS action was instituted by the appellants, who were the slaves of James Doran, deceased, in his life-time, and who sued by their next friend, against the executors and heirs-at-law of said Doran. The plaintiffs claimed their freedom under two special acts of the legislature of Alabama, which were made exhibits to their petition, and under the will of said Doran, which was admitted to probate, in November, 1840, as a will of personal property only, being attested by but two witnesses.

The first act of the legislature, entitled "An act to authorize James Doran to emancipate certain slaves therein named," approved January 20, 1832, was in these words: "Be it enacted," &c., "that James Doran, of Jackson county, be, and he is hereby, authorized to (to take effect at his discretion) emancipate and set free slaves of the following names—viz., Sally, Annie, Jack, Catsby, Davy, Emeline, Eliza, Jane, Nancy, Amanda, Jerry, and Polly; *provided*, he shall previously convey to the judge of the county court of said county, and his successors, six hundred and forty acres of land, on which he now resides, or lands equal in value thereto, in trust forever, for the use of said slaves, as security that they shall not become chargeable on any city, county, or town in this State." The other act, which was approved January 5, 1833, and entitled "An act supplemental to" to the former, authorized said Doran to emancipate two other slaves, Jim and Esther by name, upon the condition mentioned in the previous act.

The clause of said Doran's will, upon which the plaintiffs asserted their claim to freedom, was as follows: "At the death of my wife, Linny Doran, I give and bequeath unto my negro slaves which I now have at home with me," (specifying by name all the slaves mentioned in the two acts of the legislature, and their children,) "and all future increase of their families, their freedom; *provided*, they be obedient servants to my wife during the whole of

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her natural life-time," &c. "And, as the law obliges the owners of slaves to give security before they can set them free, so that they may not become a public charge, I leave to them, for that purpose, the whole of my tract of land on which I now live, to be divided in the following manner," &c.

The suit was instituted in September, 1858. The petition alleged, that the widow of said Doran died in 1861; that the plaintiffs were afterwards carried into Tennessee, by some of the defendants, against whom the other defendants had there instituted legal proceedings for their recovery; and that the plaintiffs were still in Tennessee when their petition was filed. The circuit court sustained a demurrer to the petition, and its judgment is now assigned as error.

H. Cox, for appellant.

P. TURNER, *contra*.

R. W. WALKER, J.—[Jan. 16 1861.]—James Doran, by his will, which was executed in this State, made a direct bequest of freedom to certain slaves. According to the repeated decisions of this court, it is clear that, unless there was some legislative provision authorizing the emancipation, the bequest was void.—*Trotter v. Blocker*, 6 Por. 269; *Atwood v. Beck*, 21 Ala. 612; *Alston v. Coleman*, 7 Ala. 795; *Roberson v. Roberson*, 21 Ala. 273. It is not pretended that there was any legislative authority for the emancipation, except such as was furnished by the special acts of 1882 and 1883, which are set out in the record. These acts authorized Doran to emancipate these slaves, the emancipation to take effect at his discretion; but they provided, as a condition precedent to the emancipation, that he should previously convey to the judge of the county court of Jackson county six hundred and forty acres of land, on which he then resided, or lands equal in value thereto, in trust forever, for the use of said slaves, as security that they should not become chargeable on any city, county, or town in this

State. No conveyance of any kind was ever made, or attempted to be made by Doran, to the judge of the county court, in trust for the use of the slaves. The attempt to devise the six hundred and forty acres of land referred to, directly to the slaves, was, perhaps, made with the view of complying with this requirement of the legislature. But that attempt was futile, if for no other reason, because the will, having been attested by only two witnesses, was not so executed as to pass real estate; and, consequently, was admitted to probate, only so far as it related to personalty. This devise of the land to the slaves being void, there can be no pretense that Doran ever performed, either in form or in substance, the condition which the legislature prescribed as a pre-requisite to the emancipation. The bequest of freedom must, therefore, be treated just as if these special acts of the legislature had never existed. Thus considered, it is, according to the well settled law of this State, clearly invalid.

Judgment affirmed.

WILKINSON vs. HUNTER.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Burden of proof on question of diligence or negligence by administrator.*—On final settlement of an administrator's accounts, it being shown that a decree was rendered by the probate court in his favor, ordering his predecessor in the administration to deliver up to him certain choses in action belonging to the estate, the *onus* is on him to prove due diligence in enforcing the delivery of such choses in action; but, whether he negligently failed to procure the delivery, or failed to collect them after obtaining the possession, the *onus* is on his successor to prove the amount which, by the use of proper diligence, he might have collected.
2. *Liability of administrator for negligence, and proof thereof.*—An ad-

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ministrator is chargeable, on final settlement of his accounts, not with the nominal amount of certain choses in action belonging to the estate, which his predecessor in the administration was ordered to deliver up to him, but with the amount in money which, by the exercise of due diligence, he might have collected on them; he cannot be charged with the amount of an account on a third person, one of such choses in action, merely on proof of the solvency of the debtor; nor with the amount of a decree rendered by the probate court in favor of his predecessor, against a preceding administrator, without proof of the solvency of the defendant in said decree or his sureties; nor with the amount of a judgment rendered in favor of his predecessor, on proof that one of the defendants therein was in possession of a tract of land, the value of which is not shown, and that the other defendant removed from this State before he became administrator, and afterwards returned and sold a tract of land.

APPEAL from the Probate Court of Chambers.

In the matter of the estate of Bailey O. Newman, deceased, on final settlement of the accounts of Henry L. Wilkinson, administrator *de bonis non*, to which he was cited by William H. Hunter, his successor in the administration. Wilkinson appeared, in answer to the citation, alleged that no assets belonging to the estate had come to his hands, and moved to be discharged. Hunter contested this return, and moved the court to charge said Wilkinson with the following sums: "1st, the amount of a decree rendered by said probate court of Chambers, on the 18th August, 1855, in favor of said Wilkinson, against William Davis, former sheriff, and *ex officio* administrator *de bonis non* of said estate, for certain notes, accounts, and receipts, therein mentioned, and also certain moneys therein mentioned, which, by said decree, were required to be paid and turned over to said Wilkinson; 2d, with the balance due on a judgment, rendered by the circuit court of said county, on the 24th March, 1854, in favor of said Davis, administrator, &c., against W. W. Boazman, F. T. Boazman, and John L. Garrett, for \$230, (credited with \$73 on the 4th August, 1854, and with \$20 on the 1st September, 1854,) which could have been collected by the use of proper diligence; and, 3d, with the amount

shown to be in the hands of said Davis, former administrator, &c., as shown by the decree of final settlement, rendered by said probate court on the 18th August, 1855; with interest thereon, which could have been collected by the use of proper diligence."

"The proof was," so the bill of exceptions states, "that the plaintiff (Wilkinson) was appointed administrator of said estate on the 12th March, 1855; and that his term of office as sheriff had expired before his return in this case. The defendant (Hunter) offered in evidence the whole record of the administration of said William Davis, showing the return filed by him for final settlement, and the several orders and decrees of the court thereon, which are in the following words." (In his return said Davis charged himself with the amount of a decree, rendered by said probate court, in his favor, on the 14th March, 1854, against Elizabeth Baker, as the administrator of her deceased husband, M. G. Baker, who was the predecessor of said Davis in the administration of said Newman's estate, for \$98 29; also, with the sum of \$98, collected on the judgment in his favor against W. W. Boazman, F. T. Boazman, and John L. Garrett, which is above described; also, with an account against Thomas Cobb, for \$6 75, two accounts against William Leverett, together amounting to \$14 50, and several other accounts, notes, and attorneys' receipts, which require no particular notice. On final settlement of his accounts and vouchers, after due publication and notice, the court rendered a decree against said Davis, which,—after reciting that no objections have been made to his account; that the assets in his hands "are in notes, accounts, and receipts, on various individuals, amounting in the aggregate to the sum of \$610 60," and that he is entitled to retain \$25, commissions and attorney's fee,—orders him to deliver over to Wilkinson, his successor, "all said notes, accounts, receipts, and judgments due said estate.") "The plaintiff objected to each part of this evidence; the court overruled his objection, and admitted the evidence, and the plaintiff excepted."

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"The defendant also read in evidence, against the plaintiff's objections, the record of the suit against W. W. Boazman, F. T. Boazman, and John L. Garrett, and the note on which said suit was founded;" showing the rendition of the judgment, and the partial payments under execution, as above stated; and the plaintiff reserved exceptions to the admission of this evidence. "The proof was, that said W. W. Boazman was insolvent; that said F. T. Boazman was in possession of a piece of land after plaintiff was appointed administrator of said estate; (but the witness did not know whether or not he owned said land; nor was its value proved, nor the quantity of acres it contained;) that the said Boazman had removed to Russell county, and was keeping a family grocery near Opelika; that he was a man of family; that one witness sold him goods, and regarded him as honest, but did not think that the whole of said judgment could have been collected out of him by legal process. It was proved, also, that John L. Garrett removed from this State, with his property, before the rendition of said judgment, and before the plaintiff's appointment as administrator of said estate; that he resided in Louisiana, and was solvent, and good for this debt; that he returned to Chambers county, on a visit, in 1857-8, and, while there, sold a lot of land in said county for fifty dollars. There was proof, also, of the solvency of Thomas Cobb and William Levere; and that a decree was rendered by said probate court, on the 18th March, 1854, in favor of said Davis, administrator, &c., against Elizabeth Baker, as administratrix of M. G. Baker, deceased, (who was the former administrator of said Bailey O. Newman,) on final settlement of said M. G. Baker's administration on said estate, in favor of said Davis, as administrator, &c., for the sum of \$98 20,—for which sum, by said decree, execution was ordered to issue."

"This being all the evidence in the case, the probate court thereupon rendered a decree against the plaintiff, in favor of the defendant, for the sum of \$667 64;" to which the plaintiff excepted, and which, with the several

rulings of the court on the evidence, he now assigns as error.

BROCK & BARNES, for appellant.

RICHARDS & FALKNER, *contra*.

A. J. WALKER, C. J.—[March 9, 1861.]—We assume, that the failure of the appellant to obtain a different decree against Davis, more favorable to the estate which he represented, was not the result of any fraud or negligence on his part, for the record does not authorize us to impute either to him. When the decree was rendered in his favor, it was his duty to demand from his predecessor the evidences of debt ordered to be delivered to him, and, upon a refusal of his demand, to proceed to obtain the enforcement of the decree. It being shown that the decree for the delivery of the choses in action was rendered in his favor, the *onus* was upon him to prove that he had used due diligence to obtain their delivery; and as he failed to prove, in the court below, that he had made an effort to procure such delivery, or that he could not have procured such delivery by the use of diligence, it was proper for the court below to hold him guilty of negligence, in failing to obtain possession of the choses in action. But whether he was guilty of negligence, in failing to obtain delivery of the choses in action, or obtained possession of them, and then failed to collect them, he would only be responsible for money to the amount which, in the exercise of due diligence, he could have collected upon them. The court should have inquired, therefore, to what amount the choses in action could have been collected by him, if he had exercised proper diligence in an effort to make such collection. As to that inquiry, the *onus* of proof was on the appellee; for the law could not presume, that choses in action, not resulting from sales of property made by the appellant, but coming to him from the hands of his predecessor, were capable of collection. The correctness, therefore, of the decree rendered against the appellant, depends upon the question,

whether the evidence justified the conclusion, that, by the exercise of proper diligence, he could have realized from the choses in action, which his predecessor was ordered to deliver to him, the amount, with which he was charged.

Among the choses in action directed to be delivered to the appellant, there were three accounts—one on Thomas Cobb, and two on William Leverett—as to which there was no proof, except that Cobb and Leverett were solvent. This evidence was not sufficient, of itself, to authorize the charging of the appellant with the amount of those accounts. The accounts were not *prima-facie* evidence of indebtedness; and the administrator could not be chargeable with the amount of them, in the absence of evidence that they were debts susceptible of enforcement in courts of justice. There were several other accounts, and receipts for accounts, as to which there was no proof whatever; and with these, upon the evidence before the court, the appellant was not chargeable.

The proof did not justify the charging of the appellant with the amount of the decree against Elizabeth Baker, because there was nothing which authorized the inference, that the defendant in that decree, or the sureties liable therefor, were solvent after the appellant became administrator.

The proof before the probate court did not authorize that court to charge the appellant with the amount of the judgment against W. W. Boazman, F. T. Boazman, and John L. Garrett. Conceding that F. T. Boazman's possession of a tract of land raised the presumption that the land belonged to him; yet the value of the land was not shown; and it could not be inferred, therefore, that either the entire judgment, or any specified part of it, could have been collected out of the land. Whether, in the attitude of the case made by the proof, the *onus* as to the exemption of the land from execution was upon the one party or the other, we do not decide. If, upon a future trial, it should appear that Boazman really owned a tract of land, the parties can easily settle the question, whether

the land was exempt from execution, by introducing testimony on the point. The mere fact that Garrett, one of the defendants in the judgment, returned from Louisiana, and sold a lot of land for fifty dollars, did not show that the appellant could, by the use of proper diligence, have subjected the land to the payment of the judgment. Garrett was not in the possession of the land, so as to afford notice of his proprietorship; and it cannot be presumed that the appellant was guilty of negligence, in failing to discover the ownership of the land, when there was no visible indication of the fact. We mention, without comment, the fact that the proof leaves to conjecture the important question, whether Garrett had such a title to the land as was subject to sale under execution; and that it also leaves room for speculation, as to whether he sold the land for himself, or for another.

The principles above laid down, as to the claims which have been specially considered, will be sufficient to govern the probate court in passing upon the other items.

The judgment is reversed, and the cause remanded.

WRIGHT vs. FALKNER.

[ACTION FOR BREACH OF SPECIAL CONTRACT.]

1. *Damages for breach of contract.*—In an action for a breach of contract,—by which plaintiff agreed to serve defendant, in the capacity of an overseer, for the term of one year, but was discharged, without fault on his part, before the expiration of the year,—if the suit is commenced before the expiration of the year, the plaintiff can only recover unliquidated damages for the breach of contract; and it cannot be assumed, as matter of law, that the stipulated wages for the entire year would be the measure of damages.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. ROBERT DOUGHERTY.

Wright v. Falkner.

THIS action was brought by Richard Falkner, against William Wright, and was commenced on the 12th August, 1859. The complaint contained the common count for work and labor, and a special count in the following words: "Plaintiff claims of defendant the sum of \$150 damages, for the breach of an agreement entered into between them on the 24th January, 1859, by which defendant promised, if plaintiff would overseer for him, on his farm in Butler county, from that time until Christmas, 1859, that he would have plaintiff's washing done, and would give plaintiff one hundred and fifty dollars for his services; and plaintiff avers, that he commenced work for defendant, as his overseer, under said contract, on the 31st January, 1859, with the full knowledge and consent of said defendant, and fully and faithfully performed his duties as such overseer, under and according to said contract, and continued to perform them so long as said defendant permitted him to do so; but he avers, that said defendant, on the 4th August, 1859, without any just cause, turned him off from his employ, and refused to allow him to perform his part of said contract; and that said defendant then refused, although thereto requested, and does still refuse, to pay him the \$150 so promised to him, or to make any just compensation for said breach of said contract."

"On the trial," as the bill of exceptions states, "the proof showed, that the plaintiff and defendant entered into a contract, about the 24th January, 1859, by which plaintiff agreed to serve defendant as an overseer for the balance of that year, for the sum of \$150; that the plaintiff entered upon the performance of said contract, and continued with the defendant until about the 1st August, 1859, when the defendant turned him off; but the proof was conflicting, as to whether or not the defendant was justified in so turning him off. The court charged the jury, that if they believed, from the evidence, that the plaintiff and defendant entered into a contract at the time alleged in the complaint, by which the plaintiff agreed to serve the defendant as an overseer for the balance of that

year, for the price of \$150, which the defendant agreed to give; and that the plaintiff entered upon the discharge of his duties under said contract, and continued to discharge his duty properly until August, 1859, when he was discharged by the defendant, without sufficient cause, then the plaintiff was entitled to recover the whole amount which the defendant had agreed to give him for his year's wages, with interest thereon, from the time he was discharged by the defendant, up to the time of the trial." The defendant excepted to this charge, and he now assigns it as error.

BAINES & NESMITH, for appellant.

ADAMS & HERBERT, *contra*.

STONE, J.—[Feb. 14, 1861.]—The present suit was instituted before the expiration of the term during which Mr. Falkner had agreed to serve Mr. Wright in the capacity of overseer. Hence, under the authorities, we must hold, that Mr. Falkner did not elect to regard the contract as continuing, but as ended by the act of the opposite party—Mr. Wright.—*Ramey v. Holcombe*, 21 Ala. 567, and authorities cited. His suit, then, was for *unliquidated damages*, and not for *wages* due for the whole year, under the terms of his contract.—*Fowler v. Armour*, 24 Ala. 194. "In such case, the amount of wages for which he had stipulated would not be the measure of damages. His actual damage, all the circumstances considered, whether more or less than that, would be the true measure of the amount which he would be entitled to recover."—*Fowler v. Armour*, *supra*.

In this action, brought at the time it was, it cannot be affirmed, as matter of law, that the plaintiff is entitled to recover the entire wages agreed on.

Reversed and remanded.

RONEY'S ADM'R vs. WINTER.

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Note signed by agent, for principal, held prima facie contract of principal.*—A promissory note, beginning thus, "Twelve months after date, we promise to pay," &c.; and signed thus, "For the Montgomery Iron Works, J. S. W., president, S. J., secretary,"—is, *prima facie*, the contract of the principal, and not binding on J. S. W. personally.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by William C. Roney, (and was revived in the name of his administrator,) against Joseph S. Winter; and was founded on a promissory note, of which the following is a copy:

\$200.

"Montgomery, Ala., Jan. 1, 1855.

Twelve months after date, we promise to pay Wm. C. Roney, or bearer, three hundred and ninety dollars, for the hire of Jim and Jerry for the present year. We are to feed the said negroes, and furnish them with the usual clothing; usual terms of hiring governing.

"For the Montgomery Iron Works,

"J. S. WINTER, President,

"SANDERS IRVING, Secretary."

The record does not show what pleas were filed. On the trial, as appears from the bill of exceptions, the plaintiff proved the defendant's signature to this note, and then offered to read it to the jury; but, on the defendant's motion, the court excluded it. The plaintiff excepted to this ruling of the court, and was thereby compelled to take a nonsuit; and he now assigns the ruling of the court as error, and moves to set aside the nonsuit.

Roney's Adm'r v. Winter.

WATTS, JUDGE & JACKSON, for the appellant, cited Story on Agency, §§ 147, 154-57; 269, 270; Dawson v. Cotton, 26 Ala. 591; Bradlee v. Boston Glass Co., 16 Pick. 350; Harwood v. Humes, 9 Ala. 659; Lazarus v. Shearer, 2 Ala. 718; Gillespie v. Wesson, 7 Porter, 454.

JNO. A. ELMORE, *contra*.

R. W. WALKER, J.—[March 9, 1861.]—The rigid rule of the common law, which requires that a deed, executed by an attorney, for a principal, must be made and executed in the name of the principal, in order to operate as his deed, does not apply to instruments not under seal. Carter v. Doe d. Chaudron, 21 Ala. 72, 83-7; New England Marine Ins. Co. v. Dewolf, 8 Pick. 56; Andrews v. Estes, 2 Fairfield, 267; Robertson v. Pope, 1 Rich. L. 501; Story Ag. § 148; 1 Am. Lead. Cas. (2d ed.) 609.

In reference to this latter class of instruments, the rule is, that if the name of the principal appear in the instrument, and it is evident from the writing, as a whole, that the intention was that the principal, and not the agent, was the person to be bound, the principal alone will be bound, if the agent had authority to make the agreement, although the instrument be signed in the agent's name only.—Townsend v. Hubbard, 4 Hill, 351, 357; Rathbun v. Budlong, 15 Johns. 1; Penty v. Stanton, 10 Wend. 271; Bradlee v. Boston Glass Co., 16 Pick. 347; Robertson v. Pope, 1 Rich. 501; Abbey v. Chase, 6 Cush. 56; Hicks v. Hurde, 9 Barb. 529.

The principle is thus stated, in Key v. Parnham, 6 Harris & Johns. 418:—"Whenever, upon the face of an agreement, a party contracting plainly appears to be acting as the agent of another, the stipulations of the contract are to be considered as operating solely to bind the principal; unless it manifestly appears, by the terms of the instrument, that the agent intended to superadd or substitute his own responsibility for that of his principal. In such case, and in such case only, if acting within the scope of his powers, is he personally responsible."

Applying this principle to the present case, it is very

clear that the note offered in evidence did not, *prima facie*, bind Winter personally; and this conclusion is abundantly sustained by numerous decisions, in regard to instruments substantially identical in form with the note here sued on.—*Rice v. Gove*, 22 Pick. 156; *Long v. Colburn*, 11 Mass. 97; *Robertson v. Pope*, 1 Rich. 501; *Farmers' & Mechanics' Bank v. Troy Bank*, 1 Dougl. 458; *Emerson v. Prov. Hat Man. Co.*, 12 Mass. 237; *Ballou v. Talbot*, 16 Mass. 641; *Key v. Parnham*, 6 Harr. & Johns. 418; *Stringfellow & Hobson v. Marriott*, 1 Ala. 573; 1 Am. Lead. Cas. 624-7; *Rathbon v. Budlong*, 15 Johns 1; 1 *Parsons Contr.* 48.

As the note, standing by itself, did not import an obligation on the defendant, and as it was not proposed to introduce any other evidence in connection with it, it was properly excluded.

Judgment affirmed.

STONE & BEST vs. WATSON.

[ACTION FOR DAMAGES ON ACCOUNT OF UNSOUNDNESS OF SLAVE.]

1. *Demurrer to original and amended complaints.*—Where the original complaint contains a single count, and an amended complaint is afterwards filed, containing several additional counts, a recital in the judgment-entry, that a demurrer was sustained "as to the first two counts in the complaint," will be construed to apply to the single count in the original complaint, and to the first count in the amended complaint.
2. *Averment of fact, and of conclusion.*—An averment that a slave is *unsound*, is the statement of a fact, and not of a conclusion from facts.
3. *Assignment of general and special breaches.*—In an action by the purchaser, against the vendor of several slaves, a count on a subsequent contract,—by which it was agreed, on account of the unsoundness of one of the slaves, who was warranted sound, that the vendor should take back said slave, and should pay the pur-

chaser a specified sum of money, which sum the court seeks to recover,—does not require the assignment of a special breach, (Code, § 2235;) nor is a special breach required in a count on an alleged rescission of the original contract, by subsequent agreement, on account of the unsoundness of one of the slaves.

4. *Proof of value of slave.*—In ascertaining the purchaser's damages, resulting from a breach of warranty of the soundness of a slave, proof of the value of the slave a few months after the sale is admissible, as shedding light on the question of value at the time of the sale.
5. *Same.*—A slave being described in the bill of sale as a seamstress, it is permissible for the purchaser, in an action to recover damages on account of her unsoundness, to prove what would have been her value, if sound, "taking into consideration the fact that she was a good, No. 1 seamstress."
6. *Same.*—In proving the value of a slave, a witness cannot be allowed to state what her value would be, "if she possessed the qualities which she was reputed to possess."
7. *Proof of medical bill, as part of damages.*—It is permissible for the purchaser, in an action to recover damages on account of the unsoundness of a slave, to prove at whose request a physician was called in to the slave, and as whose property the physician attended her; but the physician's account for services rendered to the slave, which was paid by the purchaser, is not admissible evidence for him, until it has been proved that the services were rendered as charged, for the treatment of a disease existing at the time of the sale, and that the charges were correct.
8. *To what witness may testify.*—A witness may testify that a slave looked sick, although he is neither a physician, nor an expert.
9. *Declarations of sick slave.*—The declarations of a slave while sick, as to the nature and symptoms of his disease, are competent evidence on the principle of *res gestæ*, as well as from the necessity of the case, although made to a person who is not a physician.
10. *Relevancy of evidence on question of care or negligence.*—One of the questions in the case being, whether the purchaser was guilty of negligence in his treatment of a female slave, during the time she remained in his possession, before he tendered her back to the vendor; and it having been proved that the slave was badly burned, while in his possession, by the accidental explosion of a fluid lamp, whereby her value was greatly impaired, and was afterwards sent by him, by the public stage, to the place of the vendor's residence,—it is permissible for him to prove that the slave violated his orders in using the lamp, and that he was advised by a physician, whom he consulted, that he might send her by the stage with safety.

APPEAL from the Circuit Court of Talladega.

Tried before Hon. ROBERT DOUGHERTY.

THIS action was brought by S. D. Watson, against the appellants, as partners. The original complaint contained a single count, claiming \$8100 damages for a breach of a warranty of soundness of three slaves—Sarah Ann, Elizabeth, and Caroline, by name—sold by defendants to plaintiff on the 6th March, 1857; and an amended complaint was afterwards filed, in the following words;

“The plaintiff, by leave of the court first had and obtained, claims of the defendants \$2000 damages for a breach of warranty in the sale of certain slaves, to-wit, Sarah Ann, a seamstress woman, about twenty years old, Elizabeth, and Caroline, by the defendants to the plaintiff, on the 6th March, 1857; which slaves the defendants warranted to be sound and healthy, when in fact, at the time of said sale and warranty, said slaves were unsound and unhealthy.

“The plaintiff claims of the defendants the further sum of \$1300, due by contract made by them on the 1st July, 1857, substantially as follows: The plaintiff, on the 6th March, 1857, purchased from the defendants the negroes above mentioned, for the sum of \$3150, (all of which was paid at that time,) and the said defendants then and there executed and delivered to plaintiff their bill of sale for said slaves, warranting them to be sound and healthy; but plaintiff avers, that said girl Sarah Ann was not sound and healthy at the time of said sale, but, on the contrary, was unsound and unhealthy; in consequence of which, plaintiff was greatly injured, to-wit, in the sum of \$1500, for which the defendants thereby became liable to him in an action at law; and the defendants, in consideration thereof, on the 1st July, 1857, agreed with plaintiff to take back said Sarah Ann, and to pay plaintiff the sum of \$1300; and plaintiff agreed, on his part, to return said slave; and in pursuance thereof, he did, on the 8th July, 1857, return her to the de-

defendants; yet they have failed and refused to pay said sum of money, or any part thereof.

"The plaintiff claims of the defendants, also, the further sum of \$1800, for that the plaintiff, on the 6th March, 1857, purchased of the defendants the slaves above named, for the sum of \$3150, (all of which was paid on said day,) and the defendants then and there executed and delivered to plaintiff their bill of sale for said slaves, warranting them to be sound and healthy; but plaintiff avers, that said slave Sarah Ann, at the time of said sale and warranty, was not sound or healthy, but, on the contrary, was much diseased; in consequence whereof, the defendants became liable to an action at law by the plaintiff; in consideration whereof, the defendants agreed with the plaintiff to pay him the sum of \$1800, and to take back said slave Sarah Ann; and the plaintiff, in pursuance of said contract, on the 8th July, 1857, tendered and offered to deliver said slave to defendants, but the defendants refused to receive said slave, and also failed and refused to pay said sum of money, or any part thereof, to the said plaintiff.

"The plaintiff claims of the defendants the further sum of \$1800, for that the plaintiff, on the 6th March, 1857, purchased of the defendants the negroes above named, for the sum of \$3150, (which was all paid at that time,) and the defendants then and there executed and delivered to plaintiff their bill of sale for said slaves, warranting them to be sound and healthy; but plaintiff says, that said Sarah Ann, at the time of said sale and warranty, was not sound or healthy, but was diseased, unhealthy, and worthless; whereby defendants became liable to plaintiff in an action at law; in consequence whereof, defendants agreed, on the 7th July, 1857, to pay plaintiff \$1800, and to take said slave back, and to go or send [to] plaintiff for her, and plaintiff agreed, on his part, to deliver her up to defendants when desired; but plaintiff says, that defendants utterly failed and refused to go or send for said slave, or to pay plaintiff said sum of money; whereupon, plaintiff tendered said slave to

defendants, but they failed and refused to receive her, or to pay said sum of money, or any part thereof.

"The plaintiff claims of the defendants the further sum of \$1800, for that the plaintiff, on the 6th March, 1857; purchased of the defendants the negroes above named, for the sum of \$3150, (all of which was paid at the time,) and the defendants then and there executed and delivered to plaintiff their bill of sale for said slaves, warranting them to be sound and healthy; but plaintiff avers, that said slave Sarah Ann, at the time of said sale and delivery, was diseased, unsound, and worthless; in consequence whereof, plaintiff, on the 1st June, 1857, returned her to defendants, and rescinded said sale as to said slave; by means whereof, defendants became liable to an action at law, in favor of the plaintiff; in consideration whereof, defendants agreed to pay plaintiff the sum of \$1800, but they have failed and refused so to do."

(The three remaining counts of the amended complaint are the common counts for money had and received, money paid, laid out and expended, and work and labor done.)

The judgment-entry recites, that the defendants demurred, in short by consent, to the entire complaint, and to each count thereof; that the assignment of special grounds of demurrer was waived; that the court sustained the demurrer "as to the first two counts in the complaint," and overruled it as to the remaining counts and the whole complaint; and that the defendants then pleaded the general issue, "with leave to give any special matter in evidence, and with like leave to the plaintiff in reply."

On the trial, as appears from the bill of exceptions, the plaintiff read in evidence to the jury, after proving its execution, the defendants' bill of sale for the slaves, which was dated the 6th March, 1857, contained a warranty that the slaves were sound and healthy, and described the girl Sarah Ann as "a seamstress woman, about twenty-four years old;" and then offered in evi-

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dence the deposition of Dr. B. O. Jones, which was taken on interrogatories and cross-interrogatories. The third direct interrogatory to this witness was in these words: "Int. 3. *What would said girl have been worth, when you first visited her, if she had been sound, taking into consideration the fact that she was a No. 1 seamstress? what was she worth, at that time, in the condition in which she really was? what would she have been worth, on the 6th. March, 1857, if she had been sound, and a good, No. 1 seamstress? what was she worth, at that time, in her then condition as to health?*" The defendants objected, at the time of filing cross-interrogatories, to each of the italicized portions of this interrogatory, and renewed their objections at the trial; but the court overruled each of the objections, and they excepted. Another interrogatory to this witness called on him to state "by whom, at whose request, and as whose property, he was called in to attend the girl Sarah Ann;" and exceptions were reserved by the defendants to the overruling of their objections to this interrogatory. The witness testified, in substance, that he was called in by plaintiff, in May or June, 1857, to prescribe for the girl Sarah Ann; that he then found she had a slight disease of one of her lungs, which, he thought, must have existed on the 6th March, 1857; and that he was afterwards called in to prescribe for her on account of a burn on her left arm. The bill of exceptions states, at "there was no proof as to the qualities or acquisitions of said negro, other than the statement in the bill of sale that she was a seamstress."

"The plaintiff introduced evidence, also, tending to show an agreement between him and the defendants, made in Talladega, where the defendants lived, some time after the sale, (the negro being then in the plaintiff's possession, in the city of Montgomery,) by which it was agreed that, if said negro was unsound at the time of the sale to plaintiff, defendants would take her back, and would pay plaintiff \$1250, by way of expenses, and her stage fare from Montgomery to Talladega; but, as to what this contract was, there was a conflict in the proof,—

some of the evidence tending to show, that the defendants agreed to take her back, and to pay as above stated, if she was unsound at the time of the sale, and was delivered to them, in Talladega, in the condition she was at the time of the sale. At the time this agreement was made, (whatever it was,) the negro had not been burned; but afterwards, while she was in the plaintiff's negro-house in Montgomery; and under the charge of one Ball, plaintiff's agent, she received a burn upon her left arm, by the explosion of a fluid lamp, which was kept in said negro-house by said Ball, and which she was at the time attempting to use; and all the evidence tended to show, that her permanent value was thereby decreased one half, or more. Some ----- days after she was thus burned, said negro was sent, by plaintiff's agent, or by his directions, on the stage, to Talladega, where she was tendered to the defendants, who refused to receive her, or to pay the \$1250. Said Ball testified, in behalf of the plaintiff, that he was in plaintiff's negro-house, acting as his agent, when said negro was purchased by plaintiff, and came to said house; and that said negro, when she came to said house, coughed, looked sick, and complained to witness of a pain in her breast. It being admitted that this witness was not a physician; the defendants objected to" the italicized portions of his evidence, as being illegal and irrelevant, and reserved exceptions to the overruling of their objections. "This witness further testified, *that the negro was not allowed, by a rule of the house, to use said lamp,* in using which she was burned; that Dr. B. C. Jones was called in to attend her, and treated the burn several days; that when he was about to send the negro to Talladega, *he consulted Dr. Jones as to whether it would be safe to send her by the stage; and that Dr. Jones told him, in his opinion it would be safe to send her to Talladega on the stage.*" The defendants objected to each of the italicized parts of this evidence, on the ground of illegality and irrelevancy, and reserved exceptions to the overruling of their objections.

On cross-examination of one Thomason, one of defendants' witnesses, who had stated that he knew the negro

in controversy, the court permitted the plaintiff to ask him, against the defendants' objection, what was the value of the negro, at the time of the trial, which was in May, 1859; and the witness having answered, "that he did not know the qualities of the girl of his own knowledge, but knew them from reputation;" the court permitted the plaintiff to ask him, against the defendants' objection, "what would be her value, if sound, if she possessed those qualities which she was reputed to possess;" and the defendants reserved exceptions to each of these rulings of the court.

The court also permitted the plaintiff to read in evidence to the jury Dr. Jones' account for medical services rendered to the slave, on proof of the doctor's signature to the receipt acknowledging payment by the plaintiff. The defendants objected to the admission of this evidence, "on the grounds that it was illegal, irrelevant, calculated to mislead the jury, and because there was no proof that the amounts charged were reasonable and proper, and because there was not sufficient proof that the plaintiff had paid said accounts;" and reserved exceptions to the overruling of these several objections.

The several rulings of the court on the pleadings and evidence, as above stated, are now assigned as error.

HEFLIN, MARTIN & FORNEY, for appellants.

L. E. PARSONS, and JNO. WHITE, *contra*.

A. J. WALKER, C. J.—[March 7, 1861.]—In the original and amended complaint, adding additional counts, there were nine counts. The record informs us, that the defendants' demurrer to the first two counts was sustained, and that it was overruled as to the remaining counts. From this we understand, that the demurrer was sustained as to the single count in the original complaint, and as to the first count in the amended complaint, and that it was overruled as to the last seven counts in the amended complaint.

[2.] Two reasons are urged, why the court below

erred in so overruling the demurrer to the seven counts. The first reason is, that the averment of the unsoundness of the slave is the statement of a conclusion, and that therefore it was necessary for the pleader to have alleged in what the unsoundness consisted. From this argument we must dissent; for we regard unsoundness as a fact, which may appropriately be averred in pleading.

[3.] The second reason urged in support of the demurrer, is, that the counts are misjoined, because some of them require a special breach, while others do not.—Code, § 2235. This argument, we think, is also unsound, for we do not regard either of the counts as requiring a special breach, in the sense in which that phrase is used in the above cited section of the Code.

[4.] In ascertaining the damages resulting from the breach of warranty of soundness, the proper inquiry, of course, was as to the value of the slave at the time of the sale. But it was permissible to prove what her value was a few months afterwards, as reflecting light upon the question of her value at the time of the sale.—Ward v. Reynolds, 32 Ala. 384. There was, therefore, no error in overruling the first three objections to the interrogatories propounded by the plaintiff to Dr. B. C. Jones.

[5.] The defendants objected to an interrogatory to the witness Jones, inquiring what would have been the value of the slave, if she had been sound and "a good, No. 1 seamstress." It was certainly proper to prove the value of the slave with her qualities upon the hypothesis of her soundness. The bill of sale made by the defendants to the plaintiff represented the slave to be a seamstress, but did not specify that she was a seamstress of quality known as No. 1. We think it probable, that the fact that the negro's quality as a seamstress was made the subject of a special and formal description in the bill of sale, authorized an argument to the jury that she possessed some eminence of skill as a seamstress, and might be classed as No. 1. If there was any tendency of proof to show that she was a "No. 1 seamstress," it was permissible to inquire as to her value upon that

supposition. We decide, though with some doubt, that there was in the statement of the bill of sale such tendency of proof, and that therefore there was no error in overruling the fourth objection to the plaintiff's interrogatories to Jones.

[6.] The evidence of Thomason, as to the value of the slave according to the qualities which she was reputed to possess, was manifestly inadmissible. The legitimate inquiry was, her value upon the supposition of the qualities which she did possess, and not of those she was reputed to possess.

[7.] The inquiries of the witness Jones, as to the person by whom, and at whose request, he was called to visit the slave in her illness; and as whose property he visited her, were calculated to elicit information of the facts necessary to sustain the plaintiff's claim for damages on account of a medical bill contracted in treating her disease. The objection to that inquiry was, therefore, properly overruled.

The court erred, however, in admitting in evidence the account of Dr. B. C. Jones, there being no evidence of its correctness. The account could, upon no principle of law, be admissible, until it was proved that the services were rendered as charged, and that the charges were correct. Besides, the account could not be evidence, unless it was contracted for the treatment of a disease which the slave had at the time of the sale.

[8.] Evidence that the slave *looked sick*, conduced to establish a fact, which was one of the material matters in issue. The appearance of a slave is certainly a fact, and not a conclusion, and is susceptible of proof by one not an expert, who has seen the slave.

[9.] The declaration of the slave, as to the present existence of a pain in her breast, was clearly admissible; and the point has been repeatedly so adjudged by this court.—*Wilkinson v. Moseley*, 30 Ala. 562; *Barker v. Coleman*, 35 Ala. 221.

[10.] At least under some of the counts in the complaint, evidence as to whether the burning of the slave

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was caused by the plaintiff's negligence, was admissible. 1 Parsons on Con. 445. To this question, the fact that the slave was, by a rule of the house in which she was kept by plaintiff, not allowed to use the lamp, in using which she was burnt, was clearly pertinent, and there was no error in admitting that fact in evidence. And so, also, in the same point of view, the fact that the plaintiff consulted a physician, as to the prudence and safety of sending the slave to Talladega; and that Dr. Jones, being a physician who had treated her case, advised him that she might be safely sent, would be competent evidence upon the question, whether the defendant was guilty of any negligence in sending the slave to Talladega. The unsworn opinion given by Dr. Jones would not be evidence that it was safe to so send the slave; but the fact that he was consulted, and so advised, has a direct bearing upon the question, whether the plaintiff acted carelessly and incautiously.

We deem it proper to observe, in reference to the 6th count, which avers a delivery of the slave to the defendants, and an agreement on their part to pay, in consideration thereof, the sum of thirteen hundred dollars, that we regard it as showing a rescission by consent of both parties, and that we must not be understood as affirming that it is good as a count for a rescission against the wishes, and without the consent of the defendants.

Reversed and remanded.

STONE, J., not sitting.

POLLY vs. McCALL.

[ACTION TO RECOVER DAMAGES FOR OVERFLOW OF LAND.]

1. *Admission of one defendant, in action against two.*—In an action against two defendants, the admissions of one, being competent

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evidence against the maker, cannot be excluded from the jury on motion: his co-defendant must limit their operation by a request for proper instructions to the jury.

2. *Proof of written notice.*—In an action to recover damages for overflowing land, proof of a written notice by plaintiff to defendant, requiring an abatement of the ditch and levee by which the overflow was caused, being collateral to the issue, is within the exception to the general rule in regard to the proof of writings; and the contents of such notice may be proved by oral testimony, without producing the writing, or accounting for its non-production.
3. *Prescriptive easement.*—A tolerated or permissive user of an easement can never ripen into a title by prescription, while a user which is adverse, independent, or as of right, if continued for a period corresponding with the statutory bar to a right of entry upon land, will confer an absolute right; but the use of a ditch and levee on a party's own land, which is in itself rightful, cannot confer a prescriptive right to injuriously overflow the lands of an adjacent proprietor many years afterwards, when the ditch has become gradually filled up with the sand and dirt accumulated and deposited therein by the continued flow of water.
4. *Limitation of action.*—Under the provisions of the Code, (§ 2481, subd. 6.) one year is the bar to an action to recover damages for overflowing lands.
5. *Damages, and evidence.*—In an action to recover damages for overflowing lands; a recovery cannot be had for injuries accruing after the commencement of the suit; but evidence of such injuries is admissible, with a view of affording information to the jury of the consequences of the diversion under similar circumstances before suit brought.
6. *Burden of proof.*—If a person diverts water from its natural channel, by means of a ditch and levee on his own lands, and thereby injuriously overflows the lands of an adjacent proprietor; and this injury continues, without increase, for ten years,—the jury may infer from these facts, in the absence of all other evidence, that the use was adverse, and of right.
7. *Charge to jury, if correct, must be given as asked.*—Since the statute (Code, § 2355) imperatively requires, that a charge to the jury, if correct and not abstract, must be given in the language in which it is asked, the doctrine of error without injury cannot be applied to the refusal of such charge, although the legal proposition embraced in it was substantially enunciated in another charge given by the court.

APPEAL from the Circuit Court of Lowndes.
Tried before the Hon. ROBERT DOUGHERTY.

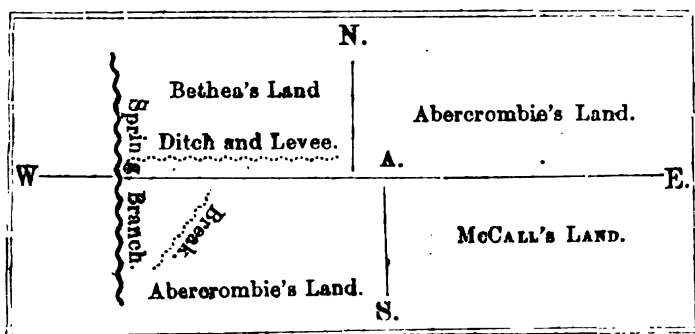
Pelly v. McCall.

THIS action was brought by Mrs. Mary McCall, against Thomas Pelly and James K. Whitman, to recover damages for the overflowing of plaintiff's lands by the defendants' diversion of water from its natural channel. The defendants pleaded "the general issue, and the statute of limitations," in short by consent; and the cause was tried on issue joined on these pleas. The facts of the case, as stated in the bill of exceptions, are these:

"The plaintiff proved her possession and ownership of the lands described in the complaint, and then offered evidence showing that one Abercrombie owned lands adjoining hers on the west and north; that the defendants' lands, which cornered hers on the north-west, were once owned by one Bethea; that a spring branch, which arose on a different part of plaintiff's plantation, flowed northward through Abercrombie's lands on the west, and then through Bethea's said lands, and, in its natural flow and condition, did not, nor did any of the waters from the same, ever run upon or through any part of the lands of plaintiff described in the complaint; that said Bethea, in 1841 or 1842, cut a ditch, and threw up a levee on the north side thereof, along the south line of his said land; that said ditch and levee ran east and west, and terminated near the north-west corner of plaintiff's said lands, commencing at a point west of said branch, and crossing the same nearly at right angles; that there was a break, or channel, leaving said branch about eighty yards above said ditch, running in a north-eastern direction, and intercepting Bethea's line; but the evidence was conflicting, as to whether this break was a natural channel, existing before said ditch was made, or whether it commenced after said ditch was made, and was caused by the damming up of the waters of the branch by the ditch and levee. The evidence was also conflicting, as to whether or not Bethea, when he built the ditch and levee, left an opening at the original channel for the water to pass through; but the evidence showed that he left no such opening for the water passing through the break, and that none of the waters of said branch in their natural flow, either

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through the break or through the original channel, ever ran upon the plaintiff's said lands; and that the water which naturally ran upon Bethea's said lands, or at least a large portion of the same, was diverted from his lands by said ditch and levee; and thrown at the corner of plaintiff's lands above mentioned. The following diagram shows the relative positions of said lands, branch, ditch, break, &c.:



"The evidence further tended to show, that when said ditch and levee were originally constructed, the water thereby diverted from Bethea's land was nearly all thrown upon the lands of Abercrombie, at the point marked A, which was lower than plaintiff's adjoining lands; but that a little water would run upon the corner of plaintiff's lands, near said point, in time of floods, although no perceptible damage was thereby done to plaintiff's said lands until the year 1857; and that the low place at said point on Abercrombie's land had become filled up, about the beginning of the year 1857, by the sand and gravel which had been thrown upon it by said water; until it became higher than plaintiff's adjoining land, and the water then began to flow in large quantities upon plaintiff's land, bringing with it large quantities of sand, which was deposited upon plaintiff's land; and that said land, which was in cultivation when said ditch was dug, and from that continuously up to the beginning of this suit, was thereby damaged and injured. The evidence further showed, that in 1842, and for more than ten years after-

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wards, the defendant Polly acted as Abercrombie's agent as to his lands at the point in controversy; and the plaintiff proved an admission by said Polly, made in 1844 or 1845, that Bethea's diversion of water by said ditch and levee greatly injured both plaintiff and said Abercrombie, and was a great outrage; that Abercrombie, in 1848, had sued Bethea for the damage done to his land by said ditch and levee, and had recovered \$50 damages; that Bethea then promised to abate the ditch and levee, and to allow the water to flow in its natural channel; and that he did some work for that purpose in 1845-46, which was ineffectual. The defendants objected to the admission as evidence of Polly's said admissions; the court overruled the objection, and admitted the evidence; and the defendants excepted. The plaintiff also proved, by the admissions of said Polly in 1849, that Bethea was then promising to abate said ditch and levee, and thereby to prevent the diversion of said water as aforesaid.

"The evidence further showed, that said Bethea died in 1851; that in January, 1857, the devisee under his will sold said lands to the defendants, who immediately went into the possession thereof, and owned and held them ever since. The evidence also tended to show, that, although said Bethea made some ineffectual attempts to turn the water from plaintiff's land, he never did so; that, although the ditch dug by him nearly filled up by the lapse of time, yet he suffered and permitted said levee to remain; that the obstruction thereby caused to said waters continued to divert them at the point above mentioned, and the same was suffered and permitted to continue until the defendants became the owners of said lands; and that they suffered and permitted the same to continue up to this time, although they could have prevented said water from flowing upon plaintiff's said land, by removing the obstructions aforesaid, and permitting the water to flow in its natural channel upon their own land. The plaintiff offered a witness who testified, that in March, 1857, as the agent of the plaintiff, he handed the defendants a written notice from the plaintiff, notifying them that

their continuance of the obstruction of the natural flow of said water was injuring her lands, and requiring them to remove or abate the same. The defendants thereupon objected to the witness testifying in relation to said notice, unless the writing was produced, or its absence accounted for. The defendants had not been previously notified or requested to produce the writing; but they were in court when the objection was made, and the plaintiff's counsel then stated, that he wished them to produce it, if they had it. The court overruled the objection, and the defendants excepted. The witness further testified, that about the same time, as the plaintiff's agent, he had given the defendants a verbal notice to the same effect.

"The plaintiff proved, separately, the damage sustained by her in the use of said land overflowed by said water, and in the injury to her crop growing thereon, during the period of one year before the commencement of the suit, and also the damage done to the land during the same period; and then offered to prove the injury to the land by the overflowing thereof since the commencement of the suit. The defendants objecting to the allowance of this proof, the court thereupon decided, that the plaintiff could not recover ~~for any injury or damage since the commencement of the suit~~, but that the evidence might be admitted with the view of throwing light upon the question as to the injury or damage within one year before the suit was brought, and for this purpose alone; and then overruled the defendants' objection, and admitted the evidence for this purpose; to which the defendants excepted. The court also stated, at the time of admitting this evidence, that the jury would be instructed on the subject at the proper time; and in charging the jury, the court distinctly told them, that the plaintiff could not recover for any injury or damage done, or sustained since the suit was brought, but, if entitled to recover at all, could only recover such damages as had accrued to her within one year before the suit was brought."

"There was no evidence in the cause showing, or tending to show, that said Bethea, or any other person, ever claimed or asserted any right to overflow the lands of plaintiff or said Abercrombie by said ditch and levee, except the evidence above set out. The defendants insisted on the trial, that the plaintiff's right was barred by the adverse enjoyment and user of the ditch and levee by Bethea and those claiming under him. The court charged the jury, among other things, 'that neither Bethea, nor those who held under him, could acquire the right to overflow the plaintiff's lands by prescription, unless they satisfied the jury by the evidence, not only that he or they had overflowed plaintiff's lands for a period of ten years before this suit was brought, but that this was done as of right; and that the burden of showing this affirmatively was upon the party setting up the prescription.' The defendants excepted to this charge, and then requested the court to instruct the jury as follows: (1st.) 'That if the ditch and levee erected by Bethea in 1841-42 flowed water or sand upon plaintiff's lands, and she knew that fact, and that this flow of water and sand commenced at a period, and continued, more than ten years before the commencement of this suit, then the plaintiff is not entitled to recover.' (2d.) 'That if the injury complained of occurred more than one year before the beginning of this suit, then the plaintiff is not entitled to recover.' The court refused each of these charges, and the defendants excepted to their refusal."

The rulings of the court to which exceptions were reserved by the defendants, as above stated, are now assigned as error.

J. F. CLEMENTS, with whom were R. M. WILLIAMSON, and GEO. S. COX, for appellants.—1. The court erred in allowing the plaintiff's witness to speak of the written notice, without producing the paper, or accounting for its absence.—*Boykin, McRae & Foster v. Collins*, 20 Ala. 280; *Wiswall v. Knevals, Hall & Townsend*, 18 Ala. 66. The fact that the witness further testified to the service

of a verbal notice, did not cure the error in the admission of the evidence; for that would be to allow to allow the witness to decide upon the effect of the written notice.

2. The admissions of Polly in 1848 were illegal and irrelevant, and ought to have been excluded.

3. The admission of proof as to the damage done after the commencement of the suit, was without legal authority; and the injury done by it was not cured by the charge of the court.—Langford v. Owsley, 2 Bibb, 215; Shaw v. Etheridge, 3 Jones' Law, 300; Duncan v. Markley, Harper, 276.

4. The charge given by the court instructed the jury, in effect, that the defendant was bound, in order to make out his prescriptive right, to adduce other evidence than the user itself; thereby violating the recognized principle, that the jury may presume the user to have been of right from the mere fact that it was enjoyed for a period of ten years.—Eeling v. Williams, 10 Barr, 126; Stein v. Barden, 24 Ala. 130, and authorities there cited. As to a prescriptive right to divert water from its natural channel, see Middleton v. Gregorie, 2 Rich. 631; Tyler v. Wilkinson, 4 Mason, 397; Smith v. Smith, 3 Halsted, 140; Trask v. Ford, 39 Maine, 439; Bullen v. Runnels, 2 N. H. 255.

5. The first charge asked and refused, asserted a correct legal proposition, and was necessary to the protection of the defendants' rights before the jury. The fact that the plaintiff knew of the diversion and overflow, warranted the presumption that she acquiesced in it; and her long acquiescence authorized the inference of a grant or right.—Campbell v. Wilson, 3 East, 294; Tyler v. Wilkinson, 4 Mason, 402; Angel on Water-Courses, §§ 200–218.

BAINÉ & NESMITH, *contra*.—1. As to the admissibility of parol proof of the written notice given by plaintiff to defendants, see 2 Phil. Ev. 225; 4 *ib.* 438, and cases there cited.

2. As to the admissibility of evidence of damage ac-

cruing after the commencement of the suit, for the single purpose for which it was admitted by the court, see *Stein v. Burden*, 24 Ala. 130.

3. The affirmative charge of the court enunciated two legal propositions, each of which is firmly established by a long chain of adjudications: 1st, that, in order to give a title to an easement by prescription, the enjoyment must be as of right; and, 2d, that the burden of proving this rests on the party who sets up the prescription.—1 Greenl. Ev. § 530; Angell on Water-Courses, §§ 216-221; *Brown v. King*, 5 Metcalf, 181; *Sargent v. Bullard*, 9 Pick. 251; *Mebane v. Patrick*, 1 Jones' Law, 25; *Ingraham v. Hough*, *ib.* 39; *Felton v. Simpson*, 11 Iredell, 85; Angell on Limitations, § 390. The charge does not, either expressly or by implication, withdraw from the jury the right to consider all the evidence in determining whether the enjoyment was of right; and if the defendants feared that it might mislead the jury, they should have asked an explanatory charge.—*Ewing v. Sanford*, 19 Ala. 605; 28 Ala. 200.

4. The first charge asked, if given, would have authorized a verdict for the defendants, although the jury might have believed from the evidence that Bethea always admitted the wrong, and promised every year to remove it.

5. The second charge asked confounds the injury with the damages. The injury of which the plaintiff complained was the diversion of the water, while she claimed the damages resulting from that injury. The fact that the injury—i. e., the tort, or wrongful act, by which the damage was subsequently caused—occurred more than a year before the suit was brought, would not, as the charge asserts, bar a recovery for the damages which accrued from that tort within the twelve months. But, if injury and damages are to be considered as synonymous terms, then the refusal of the charge amounts only to error without injury; since the court expressly instructed the jury, that the plaintiff's recovery must be limited to the damages which accrued within twelve months before the commencement of the action.

Polly v. McCall.

STONE, J.—[June 22, 1860.]—The circuit court did not err, in admitting evidence of the admissions of the defendant Polly. The facts which the admissions tended to prove were material, and, as against the defendant Polly, we can perceive no reason for excluding them from the jury.—Palmer v. Severance, 9 Ala. 751; Falkner v. Leith, 15 Ala. 9; Goodman v. Walker, 39 Ala. 500.

[2.] Neither did the court err, in admitting oral testimony of the written notice served in this case. This fact was collateral to the issue—was not necessary to the plaintiff's success in the suit, either in consequence of any requirement of the law, or of the pleadings in the cause. This case, then, is within the exception to the general rule in regard to the proof of writings.—Dumas v. Hunter, 30 Ala. 75; 1 Greenl. Ev. § 561; 2 Phil. Ev. (ed. 1849,) 225; 4 *ib.* 483.

[3.] In cases where there is no secrecy in the transaction, holding adversely, independently, and as of right, are not very distinguishable from each other. The real point of distinction is between a tolerated, or permissive user, and one which is adverse, or as of right. The former does not mature into a title by prescription; while the latter, if continued by actual adverse enjoyment for a period corresponding with that which is prescribed in the statute of limitations in reference to the right of entry upon land, will confer an absolute right.

There is another point presented by the evidence in this record, which we feel it our duty to notice. The record informs us that, although the ditch and levee, from the time they were placed there, diverted the water from its accustomed channel; and although some portions of water, in times of great floods, flowed on the lands of Mrs. McCall, yet no damage was actually done to the lands in controversy, until the year 1857. There is a wide difference, between the *act* of sinking the ditch, and the *ultimate result*, viz., the flooding of Mrs. McCall's land. The one was, in itself, rightful, because it was on the lands of him under whom defendants derive their title. The use of the ditch and levee, *per se*, needed no

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prescriptive right to uphold it. The consequential result—the injurious flooding of the lands of plaintiff—did not confer a right of action, until the injury actually occurred. Till then, the *user* in its injurious sense did not begin. A partial, harmless flooding, although exercised of right, could not, by prescription, ripen into a right to flood Mrs. McCall's lands more extensively and injuriously. The wrong, for which damages are recoverable, is the actual injury to plaintiff's land, not the remote cause from which that injury resulted many years afterwards.

[4.] In the case of *Roundtree v. Brantley*, (34 Ala. 544,) most of these questions are considered and settled. It is also there ruled, that the statute of limitations in this action is one year.—See, also, *Ang. on Water-Courses*, §§ 216 to 221, inclusive; *Ang. on Lim.* § 390; *Mebane v. Patrick*, 1 *Jones's Law*, 28; *Ingraham v. Hough*, *ib.* 39; *Esling v. Williams*, 10 *Barr*, 126; *Brown v. Cockrell*, 33 *Ala.* 88; *Felton v. Simpson*, 11 *Ired. Law*, 84; *Campbell v. Smith*, 8 *Halst.* 140; *Sargent v. Bullard*, 9 *Pick.* 251; *Brown v. King*, 5 *Metcalf*, 173; *Tyler v. Wilkinson*, 4 *Mason*, 397; *Bullen v. Runnels*, 2 *N. H.* 255; *Middleton v. Gregorie*, 2 *Rich. Law*, 631; *Trask v. Ford*, 39 *Me.* 437; *Campbell v. Wilson*, 3 *East*, 294.

[5.] The circuit court was right, in telling the jury that they could not allow damages for injuries which accrued after the commencement of the suit.—See *Shaw v. Etheridge*, 8 *Jones*, 300; *Harp.* 276; *Langford v. Owsley*, 2 *Bibb*, 215. But the court did not err, in admitting evidence of injury after the commencement of the suit, with the view of affording information to the jury of the consequences of the diversion under similar circumstances before the suit.—*Stein v. Burden*, 24 *Ala.* 147.

[7.] One portion of the affirmative charge given and excepted to, was, at least, calculated to mislead; if given without explanation. We allude to that part which asserts that, to establish a right by prescription, the burden was on the defendant of showing affirmatively that the act of flooding the plaintiff's land was done as of right. There

was, it is true, evidence which tended to repel the idea that the flooding of plaintiff's land was done *as of right*. But it was for the jury to determine what facts were proved. We hold, that where one land-holder, by a ditch and levee on his own lands, diverts water, and throws it on the lands of another to his injury; and this injury continues, without increase, for ten years; and there is no evidence on the question whether such user is permissive or otherwise,—the jury may, without further proof, infer that the use was adverse and *as of right*. This question, however, must depend much on the nature of the use, whether exclusive, &c. Many cases may be supposed—such as the use, with others, of a private way, or of a fishery—in which, doubtless, some proof would be required that the use was adverse, or *as of right*.—See *Brown v. Cockrell, supra*. Subject to this criticism, the affirmative charge was free from error.

The first charge asked was rightly refused. If given, the defendants would have been entitled to a verdict, notwithstanding the jury may have been convinced by the evidence that the author of the nuisance had given repeated and continuous assurances that the nuisance should be abated; and notwithstanding the injury may have been, for several years, slight and inconsiderable, and then have become grievous and oppressive.

The second charge asked should have been given. The injury complained was the *damage* to plaintiff's land, not the *cause* which produced that injury. Injury, in legal contemplation, is an effect—not a cause.

[7.] It is contended for appellee, that if in refusing this charge the circuit court erred, it was error without injury; for the same legal principle which this charge asserts, was expressly affirmed by the court in another part of the charge to the jury. This seems to have been the case; and we regret, under the circumstances, that we feel it our duty to send this case back for another trial. The statute, however, is positive. Its language is—"§ 2355. Charges moved for by either party, must be in writing, and must be given or refused, in the terms

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in which they are written; and it is the duty of the judge to write 'given' or 'refused,' as the case may be, on the document, and sign his name thereto; which thereby becomes a part of the record, and may be taken by the jury with them on their retirement." This section secures to parties certain rights, and also operates a protection to the court and the parties against errors of memory. Among the rights secured to the party who requests the charge, are—1st, that he can have the charge given in his own language, if the charge express a correct legal principle, and be not abstract; 2d, that he can claim that charges thus moved for, shall be carried by the jurors with them in their retirement. We should deprive parties of these rights, if we held the doctrine of error without injury applicable to such a case as this. We have no authority to sanction a practice, which would, in effect, abrogate the statute in many cases.

Reversed and remanded.

CONNOR vs. TRAWICK'S ADM'R.

[DETINUE FOR SLAVE.]

1. *Delivery, or writing under seal, necessary to constitute gift.*—At common law, in the absence of an actual delivery of the property itself, a gift could only be consummated by deed, or other instrument under seal; not because the delivery of the deed was held a symbolical delivery of the property, but on the principle of estoppel.
2. *Presumed existence of common law in other States.*—In the absence of evidence to the contrary, the courts of this State will presume that the common law prevails in other States.

APPEAL from the Circuit Court of Marengo.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by Burwell T. Connor, an

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infant, suing by his next friend, against the administrator of Ignatius A. Trawick, deceased; to recover a slave named Toby, which the plaintiff claimed under an alleged gift from his grandfather, Burwell Trawick, deceased, as evidenced by an instrument of writing in the following words:

"Know all men, by these presents, that I, Burwell Trawick, of the county of Attala, State of Mississippi, for divers good causes and considerations me thereunto moving, have this day given and conveyed unto my granddaughter, Isabella Porter, my boy Ned, also one feather-bed, and all the furniture thereto belonging; and I also give and convey to my grand-daughter, Susannah Porter, my boy Martin, and one feather-bed and furniture; and third, I give and convey to my grandson, Burwell T. Connor, my boy Toby, and watch; saving to myself, however, the use and benefit arising from all of my said property during my natural life; and I hereby appoint E. M. Wells, esquire, my trustee and guardian, to manage and control the above-mentioned property, until said children become of age or marry; giving unto each negro, at the end of the year, the sum of five dollars, for the proceeds of their labor. April 25, 1851.

"B. TRAWICK."

"We have this day witnessed the delivery of the negroes mentioned above, April 25, 1861." (Signed by William Holland and Jno. T. Holland.)

This instrument was executed in the State of Mississippi, on the day of its date, and was delivered by said B. Trawick to E. M. Wells, in the presence of William Holland and Jno. T. Holland. William Holland testified, that, at the time of its delivery, "B. Trawick called up the negroes, and told them what he had done, and that Judge Wells was the trustee, and would take charge of them after his death." Jno. T. Holland testified, "B. Trawick then called up the negroes, and explained to them what he had done—that he had given Ned to Isabella Porter, Martin to Susannah Porter, and Toby to

Burwell T. Connor; and told them that 'Judge Wells would see to them,' or words to that effect." E. M. Wells testified, "B. Trawick then called up the negroes, and told them, that he had given Ned to Isabella Porter, Martin to Susannah Porter, and Toby to B. T. Connor, and had appointed me his trustee and guardian to see to them; and I then told them to go, and attend to their old master's business." The slave Toby continued in the possession of said Burwell Trawick up to the time of his death, which occurred in March, 1858; and, on the final distribution of his estate, was allotted to Ignatius A. Trawick, the defendant's intestate, who was his son.

"On this evidence, the court charged the jury, '1st, that the instrument under which the plaintiff claims the slave, is not a deed, and has not the effect and operation of a deed in this case;' 2d, 'that if said instrument was executed by B. Trawick, and by him delivered to Wells, such delivery would not be sufficient, of itself, to pass title from Trawick by way of gift, unless the slave was also delivered;' and, 3d, 'that to constitute a valid gift, there must have been some ostensible act done to signify a transfer of the possession of the slave, and, connected therewith, a present intention, on the part of the donor, to pass the dominion over the property from himself to the donee, or to some one else for him.' The plaintiff excepted to each of these charges, and then requested the court to instruct the jury, 'that if they believed, from the evidence, that B. Trawick intended to give the boy Toby to the plaintiff, and, in order to carry out this intention, wrote the instrument read in evidence, and called on persons present to witness its execution, and signed it in their presence, and delivered it to E. M. Wells, thereby intending at the time to convey said boy to the plaintiff; and that the boy Toby was then present,—then the jury must find for the plaintiff.' This charge the court refused to give, without qualification; and the plaintiff excepted to its refusal."

The charges given by the court, and the refusal of the charge asked, are now assigned as error. •

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BROOKS & GARROTT, for appellant.—A gift of personal chattels is the act of transferring the right and possession of them, whereby one man renounces, and another acquires, title and interest therein. Delivery is essential to the validity of a gift; but it needs not to be actual—it may be constructive, or symbolical. The delivery of a deed is a constructive delivery of the property, and passes the title and dominion to the donee.—*McCutchen v. McCutchen*, 9 Porter, 650; *Adams v. Broughton*, 18 Ala. 781; *Newman v. James & Newman*, 12 Ala. 29. But it is not necessary that the instrument of writing should be under seal, though it usually has that form; and the courts, in speaking of such constructive delivery, generally use the term *deed*, because it is the appropriate description of the particular instrument before them. At one time, a deed was regarded as an instrument of unusual sanctity and solemnity; it was presumed to be founded upon a valid consideration, and its consideration could not be impeached at law. But the old doctrine has been greatly modified in modern times. In reference to personal property, a deed has no more potency to pass title than an unsealed writing. Blackstone says, that a gift may be made, “either in writing, or by word of mouth,” (2 Bla. Com. 356;) and it is not intimated that the writing must be under seal. A gift of a chattel, “by deed or writing,” is good, without an actual delivery of the property.—*Flowers’ case*, Noye’s R. 67; *Irons v. Smallpiece*, 2 Barn. & Ald. 551; *Carradine v. Collins*, 7 Sm. & Mar. 428.

S. F. HALE, *contra*.—All the authorities lay down the rule, that a gift is not effectual to pass property, unless it is accompanied by actual delivery, or consummated by deed. Here, the writing was not under seal; and there could be no actual delivery of the slave, because, by the terms of the instrument, the donee was not to have possession until after the death of the donor.

R. W. WALKER, J.—[Jan. 30, 1861.]—It has long

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been understood to be the law, that, in the absence of an actual delivery of the property, a gift can only be made by deed, or other instrument under seal. In the present case, there could be no actual delivery of the property, because, by the terms of the alleged gift, the donee was not to have possession until after the death of the donor; and as the writing relied on is not under seal, we must decide that there was not a valid gift, unless we are prepared to repudiate the rule above stated, and to hold that a gift may be consummated, as well by the delivery of an unsealed writing declaring its terms, as by the delivery of the property itself, or of a deed or other instrument under seal.

It is argued, that a deed effectuates the gift, because the delivery of the deed is but a symbolical delivery of the property; that, as the title to personalty passes by unsealed writing, as well as by deed, there is no good reason why the former, as well as the latter, should not operate a constructive delivery of the property; and that, if there ever was any substantial ground for a distinction between the two classes of writings, as the means of consummating gifts, it no longer exists, and the distinction has thus become obsolete. It is a mistake, however, to suppose, that the reason why the delivery of a deed, declaring the gift, has the same effect, as between the parties, as the actual delivery of the property, is because the delivery of the deed is but a symbolical delivery of the thing. That would not have been so in the present case, if the donor had delivered a deed, instead of an unsealed writing; for, by the terms of the gift, no immediate delivery of the property was intended, but the donor was to retain the possession and control of it so long as he lived.

It is rather upon the principle of estoppel, that, for the purpose of consummating a gift, the delivery of a deed is as effectual as the delivery of the property. According to the ancient common law, the seal was invested with great solemnity and force. "Words pass from man to man, lightly and inconsiderately; but, where the agree-

ment is by deed, there is more time for deliberation. For, when a man passes a thing by deed, first there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of the deliberation; and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed, which is the consummation of his resolution. So that there is great deliberation used in the making of deeds; for which reason, they are received as a *lien final* to the party, and are adjudged to bind the party, without examining upon what cause or consideration they were made. As if I by deed promise to give you £20, here you shall have an action of debt upon this deed, and the consideration for my promise is not examinable; it is sufficient to say it was the will of the party who made the deed."—Plowden, *arguendo*, in *Sharrington v. Stratton*, Plowd. 308.

Although it is true that, in modern times, the seal has been stripped of much of its ancient force, the doctrine of estoppel by deed is still maintained. Hence, where a gift of personal property is made by deed, the delivery of the deed transfers the right to the property; for the reason, that the form of the instrument imports a consideration for the transfer, and the maker of the deed is estopped thereby from asserting that he has not granted to the donee a power of control and dominion over the property conveyed by the deed; and this irrevocable transfer of dominion is the "one thing needful" to perfect a gift. "The deed does not operate on the property, in virtue of its being a symbol of it, but because it carries on its face an acknowledged right in the grantee to control it. A symbolical delivery of one thing, in the name of another, is no delivery of the latter. The argument of Lord Chancellor Hardwicke, in *Ward v. Turner*, (2 Vesey, Sr. 431,) is conclusive upon this point. But, if the key be delivered of a desk, in which a paper or a jewel is contained, the paper or jewel is thereby delivered; because he who has the key, has the dominion of it. A deed stands upon analogous grounds, and whenever the deed is effectually executed and deliv-

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ered, it draws to the grantee the thing according to its terms."—*Jaggers v. Estes*, 3 Strob. Eq. 380.

But, unless the donor has executed a deed, whereby he is estopped from saying that the property has not passed to the donee, no mere verbal or written declaration will consummate the gift; the doctrine of estoppel does not apply to such a case; and unless there be a deed, or a contract supported by a valuable consideration, the proprietary right of control cannot pass without a delivery of the property. Hence, a parol declaration of gift (whether verbal, or by unsealed writing) stands upon the footing of a mere promise to give, and is void in law. See *Addison Contr.* 12, 27; 1 *Parsons Contr.* 201; *Williams on Pers. Prop.* marg. pp. 33–5; *McCutchen v. McCutchen*, 9 Porter, 650, 656–7; *Irons v. Smallpiece*, 2 B. & Ald. 551; *Miller v. Anderson*, 4 Rich. Eq. 1; *Busby v. Byrd*, *ib.* 9; *Jaggers v. Estes*, 3 Strob. Eq. 379; *Morrow v. Williams*, 8 Dev. 263; *Thompson v. Thompson*, 2d How. Miss. 737; *Barker v. Barker*, 2 Gratt. 344; 11 Leigh, 489; 15 Ala. 406; 18 Ala. 822; 17 Ala. 772; 1 *Burrill's Law Dict.* (2d ed.) p. 686.

What we have said may serve to indicate the origin of the distinction between deeds, on the one hand, and verbal declarations, or unsealed writings, on the other, as the means of consummating gifts. Whatever the original reasons for the distinction, it is well established in the common law; and forming, as it does, a rule of property, we are not disposed to disturb it. If asked why we would decide, in the absence of a statute, that land could not be conveyed by an unsealed instrument, as well as by deed; or why will not a verbal declaration of gift, without delivery, be effectual to pass the title to personalty; we might find it difficult, at the present day, to give any better answer than this—The law is so settled, and it is only "with trembling hands" (according to the maxim of Montesquieu) that courts should venture to change settled laws.

[2.] The writing relied on in this case was executed in Mississippi; and there being no evidence to the contrary

before us, we must presume that the rule of the common law prevails in that State.

Whether our legislation has wrought such changes in the principles of the common law, as would enable us to hold that a gift of personal property may be made, in this State, by an unsealed writing, without delivery of the property, we need not inquire, and do not decide.

Judgment affirmed.

BEAN vs. BEAN'S ADM'R.

[BILL IN EQUITY FOR ACCOUNT, PARTITION, AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Multifariousness*.—A bill, filed by a widow, jointly with her only child by her first husband, against the administrator and heirs-at-law of her second husband, asking an account of the hire of certain slaves, in which the widow had a life-estate at the time of her first marriage, during the period of her second husband's possession of them, a partition of the slaves between her and her child, and the recovery of her distributive share of her second husband's estate.—is multifarious, since it asserts separate and distinct rights, in which the complainants have no community of interest.
2. *Dismissal for multifariousness*.—Although the chancellor seldom should, he nevertheless may, *ex sponte*, dismiss a bill for multifariousness; and if the objection really exists, the appellate court will not reverse his decree.

APPEAL from the Chancery Court of Pike.

Heard before the Hon. WADSWORTH KEYES.

THE facts of this case, as disclosed by the averments of the bill, are these: Alley Riley died, in 1829, in Autauga county, Alabama; and by his last will and testament, which was duly admitted to probate after his death, devised and bequeathed to his widow, Mrs. Dorcas Riley, a life-estate in all of his property, consisting of lands and

slaves. The estate was duly administered, and the property passed into the possession of the widow, who, in 1840, married one Jackson Mallet. Mallet died in 1845, intestate, "leaving no property of much value, except the life-estate of said Dorcas in said slaves, and another slave purchased by her, prior to her marriage with him, with the proceeds of her said life-estate;" his widow and an only child by her, Charles Mallet, being the distributees of his estate. In 1846 the widow married one Alexander Bean, having in her possession all the slaves which she had received under the will of her first husband, together with some other property, which had been purchased with the proceeds of their labor; all of which went into the possession of said Bean on his marriage, and were used and enjoyed by him up to the time of his death, which occurred in 1855.

In March, 1857, Mrs. Dorcas Bean and Charles Mallet filed their bill against the personal representatives and heirs-at-law of said Alexander Bean; alleging, in addition to the facts above stated, that the marital rights of Jackson Mallet attached to the property in which the said Dorcas had a life-estate at the time of her marriage with him; that his estate had never been settled and distributed, but had remained together undivided, and was ready for settlement; that the respective interests of the complainants in said estate had never been ascertained or set apart to them, but the entire undivided property had been used and enjoyed by said Bean during his marriage with said Dorcas; and that said Bean's marital rights had never attached to said property, because he had never reduced to possession any particular ascertained portion thereof. The prayer of the bill was, that the personal representative of said Bean "be required to account for the hire of said life-estate slaves during the time said Bean had them in his possession, receiving and appropriating their hire; also, that the said slaves, with the other property purchased with the proceeds thereof, be divided between complainants, and the right to the share of each, when ascertained, be vested in them respectively, accord-

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ing to the terms of said Riley's will, and the law governing the distribution of the same, as part of the estate of said Mallet; also, that complainant Dorcas be decreed her portion of the estate of said Bean, and for such other and further relief as the nature of complainants' case may require."

The chancellor dismissed the bill, *sua sponte*, for multifariousness; and his decree is here assigned as error.

PUGH & BULLOCK, for appellants.

H. W. HILLIARD, *contra*.

A. J. WALKER, C. J.—[June 21, 1860.]—One of the objects of this bill is to recover the interest of Dorcas Bean in the estate of her deceased husband, Alexander Bean. In that branch of the case, Charles Mallet, the co-complainant of Dorcas Bean, has not the slightest interest, and he has no connection with it. For the purposes of this opinion, we will concede to the complainants, without deciding the question, that upon the facts alleged the two complainants were, as distributees of the estate of Mallet, vested with a joint ownership in the property, which was originally derived from the estate of Riley, and the accessions to it. This being conceded, the complainant Charles Mallet may have a right to recover from the estate of Bean for the use of his moiety of the property. But the other complainant, Dorcas Bean, can have no such right; for, by the marriage in 1846 to Alexander Bean, and the reduction to possession by the husband, the latter became entitled to his wife's personalty, and to the usufruct of her real estate during the coverture. If she had a separate estate in the property, (which the bill does not show,) it is not affected by our married woman's laws, and the husband's representative would not be responsible to her for the income, rents, and profits, which she had permitted him to receive during the coverture.—*Roper v. Roper*, 29 Ala. 247. There is no point of view in which Dorcas Bean is interested in the recovery for the use by her husband of the property which she

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and her co-complainant had at the time of her marriage; and the same thing is true as to property procured with the proceeds or income during the marriage. There is, therefore, not the slightest interest in Dorcas Bean, so far as the right of her co-complainant to recover for the use of the joint property is concerned. The bill seeks nothing so far as the property itself is concerned; for it is in the possession of Dorcas Bean, and does not seem to be even claimed by the heirs or representatives of Bean's estate.

The bill, then, does not make out a case of any community of interest in the two complainants, but is designed to enforce rights distinct, unconnected, and having no relation to each other, and not such as to make it even a matter of convenience to consider them together. Such a bill is multifarious.

[2.] It is objected, that the chancellor dismissed the bill for multifariousness in the absence of a demurrer. It is rarely advisable that a chancellor should, *sua sponte*, dismiss a bill for such a cause; still, this court has decided, that he may do so, and that the decree will not be reversed, if the objection really exists.—*Felder v. Davis*, 17 Ala. 418. The decision referred to is well sustained by the authorities, and we are content to abide by it.—1 Dan. Ch. Pl. and Pr. 397; *Story's Eq. Pl.* § 284 a; *Greenwood v. Churchill*, 1 M. & K. 546; 8 Howard, 411; 10 Ohio, 456.

Decree affirmed.

BOLLING vs. WHITTLE.

[TRESPASS QUARE CLAUSUM FREGIT.]

1. *What constitutes trespass to realty.*—Where a house is erected partly on the lands of the plaintiff, and partly on the adjoining lands of

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the defendant; but is not shown to have been so erected by agreement with the plaintiff, under circumstances which would justify its removal as a mere chattel—the mere fact that the greater part of it is on the defendant's land, gives him no right to enter on the plaintiff's land, or to remove the house therefrom.

APPEAL from the Circuit Court of Butler.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by John Bolling, against A. F. Whittle, to recover damages for a trespass to land. The complaint was in the form prescribed by the Code, page 555. The evidence adduced on the trial, and the rulings of the court, are thus stated in the bill of exceptions: "The plaintiff proved by a witness, that the defendant removed a house, worth about sixty-five dollars, from the plaintiff's land, and put the same on his own land, and used it; and it was proved by a witness who had been a surveyor for many years, and who had made a survey of said lands at the instance of the plaintiff, that said house stood about thirty feet from the line of the defendant's land. The defendant then introduced a witness who had made a survey for him, and who was the county surveyor at the time of said survey; and according to the testimony of this witness, the line between the defendant and the plaintiff ran through said house, leaving a part thereof on the plaintiff's land, but the larger part on the defendant's land. The court charged the jury, that if they believed from the evidence that the larger part of the house was on the defendant's land, then they must find for the defendant." The plaintiff excepted to this charge, and he here assigns it as error.

WATTS, JUDEN & JACKSON, for appellant.

STONE, J.—[June 18, 1860.]—We think the circuit court erred in the charge to the jury. The phase of the evidence most favorable to the defendant, (and that which was supposed by the charge,) left a portion of the house on the land of the plaintiff. There is, in the record, no evidence that the house was placed there by agreement.

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with the plaintiff, under circumstances which would justify its removal as a mere chattel.—See *Wells v. Bannister*, 4 Mass. 514; *Ashman v. Williams*, 8 Pick. 402; *Curtiss v. Hoyt*, 19 Conn. 154. This being the case, the defendant had no right to enter on the land of plaintiff, nor to remove a fixture from it.—1 Chit. Pl. 178; 1 Hilliard on Torts, 516-7; 1 Hilliard on Real Property, 3; *Wentz v. Fincher*, 12 Ired. 297.

Judgment of the circuit court reversed, and cause remanded.

RAGLAND & HOWELL vs. WYNN'S ADM'R.

[ACTION ON COMMON MONEY COUNTS.]

1. *Statute of frauds; promise to pay debt of another.*—A decree having been rendered against a sheriff and the sureties on his official bond, on final settlement of his accounts as administrator *virtute officii*, a verbal promise by the sureties, made to the plaintiff in the decree, that they would pay an item of costs which, by mistake, had not been taxed, in consideration that he would allow a credit on the decree, which, as they contended, had been rendered for more than was justly due,—is an original undertaking, founded on a new consideration, and is not within the statute of frauds.
2. *Judicial notice of sheriff's term of office.*—The supreme court will take judicial notice of the time when a sheriff's term of office expired.

APPEAL from the Circuit Court of Talladega.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Henry McClellen, as administrator *de bonis non* of the estate of Mary Wynn, deceased, against George L. Ragland and Reese Howell, and was commenced in a justice's court. In the circuit court, on appeal from the justice's judgment, the defendants "waived a statement in writing by the plaintiff, and

the plaintiff consented that the defendants might prove everything as if specially pleaded." The plaintiff himself was examined as a witness under the statute, (Code, § 2313,) and testified as follows: "Soloman Spence had been sheriff of Talladega county, and, by virtue of his office as sheriff, had been administrator of the estate of Mary Wynn, deceased; and the defendants were the sureties on his official bond as sheriff. The plaintiff was afterwards appointed administrator *de bonis non* of said estate, and commenced proceedings against said Spence and his sureties, in the probate court of Talladega, for a settlement of said estate; and obtained a decree against said Spence and the defendants, for \$155 85. In taxing the costs in said proceedings, the probate court omitted to tax the printer's fee, amounting to about \$35; and plaintiff called on him to re-tax the costs, so as to include that item; but the judge advised him to see the defendants, as he thought they would settle without a rule. Plaintiff then called on defendants, who said they would not settle said costs; contending that the decree against them, as the sureties of said Spence, had been rendered for too much by fifty dollars, and that Spence was entitled to a credit for that amount. Plaintiff then proposed to allow them a credit of fifty dollars on said decree, if they would pay him the printer's fee. They at first refused, but afterwards agreed to it, and told plaintiff to instruct his attorney as to the terms on which they had settled. Plaintiff accordingly instructed his attorneys to enter the credit of fifty dollars on said decree, and it was entered according to said understanding; but the defendants had not paid said printer's fee." The plaintiff then introduced one of his attorneys as a witness, who, after stating the proceedings had against Spence and his sureties in the probate court, and that an execution on the decree "went into the hands of Lawson, the sheriff," testified as follows: "Defendants, with the sheriff, came to my office, and said, (one or both, the other being present,) that they had agreed with plaintiff, if he would allow a certain credit to go on the probate decree, that they would pay

up the remainder and settle the suit. I do not know that the subject of costs was mentioned at all; but my understanding at the time was, that the defendants were to pay all the costs of the proceedings. With this understanding, and the further statement by the defendants that, if there was anything wrong about the matter, it would be corrected when the plaintiff came to town, I signed the receipt on the execution, as attorney for the plaintiff. I received the money, and afterwards paid it to my partner, who settled with the plaintiff." The probate judge, by whom the decree was rendered, was also examined as a witness on the part of the plaintiff, and testified, that the printer's fee in the case was \$34, and that it had not been taxed in the bill of costs."

This being all the evidence in the case, the court refused to charge the jury, at the instance of the defendants, that if the defendants' promise was not in writing, they could not find for the plaintiff; and instructed them that, if they believed the evidence, they must find for the plaintiff. The defendants excepted to the charge given, and to the refusal of the charge asked; and they here assign the same as error.

L. E. PARSONS, for the appellant.

JAS. B. MARTIN, *contra*.

R. W. WALKER, J.—[July 6, 1860.]—The promise of the defendants, being founded on a new consideration beneficial to the promisor, was an original undertaking, and not within the statute of frauds.—*Martin v. Black*, 21 Ala. 309; *Blount v. Hawkins*, 19 Ala. 100.

[2.] The bill of exceptions does not expressly state that the agreement between the parties was made, and the decree credited in pursuance of it, before the commencement of this suit. But it is shown that these transactions occurred while Lawson was sheriff of Talladega county; and we judicially know that he ceased to be such sheriff in 1854, nearly two years before this suit was instituted.

We think that the evidence set out in the bill of ex-

ceptions shows a valid contract, and its breach, and that the court did not err in the charge given.

Judgment affirmed.

WYNNE AND WIFE vs. WALTHALL.

[BILL IN EQUITY FOR CONSTRUCTION OF WILL.]

1. *General rules of construction.*—In the construction of wills, all the parts are to be construed in relation to each other, so as to form, if possible, one consistent whole; and though the former of two inconsistent clauses must yield to the latter, yet this rule is only applicable after the failure of every attempt to give to both such a construction as will render them equally effective.
2. *Bequest construed to vest in children equal interest with widow in annual increase of property.*—Testator, by the first clause of his will, directed that all his property, both real and personal, should be equally divided among his wife and three children, share and share alike; and that his entire estate should be kept together and managed by his executors, (who were also appointed guardians of his children,) until his eldest child, a son, should attain his majority, when his share was to be set apart to him; the share of each daughter to be allotted to her when she attained the age of twenty-one years, or married before that time with the consent of her guardians. The second clause was in these words: "It is my will and desire that, after all my just debts and liabilities shall have been paid, the said executors and guardians of my children shall pay over to my said wife, from time to time, as she may call for the same, such portion or part of the annual increase or profits of all my said property as she may desire; the remainder to be by them invested for the benefit of my said wife and children." The fourth clause directed his executors to sell a certain town lot, to purchase another suitable lot in the same village, and to have erected thereon a dwelling-house, "for the residence and benefit of my [his] said wife, after such plan, and in such style as she may desire and direct." The third clause directed the sale of the plantation on which he resided, and the fifth and sixth clauses a sale of certain personal property; while the seventh clause provided, that if the widow or any one of the children should die before the allotment to the latter of their respective shares, the sur-

vivors should take the interest of the deceased; and that if all the children should die before their respective shares had been allotted to them, then the widow should "have the proceeds and profits of all the property during her life." *Held*, that while the widow was entitled, under the second clause, to demand and receive from the executors the entire annual profits of the property after the payment of the testator's debts, she had no right to use them for the purpose of investment, or for her own exclusive benefit in any other manner: that the children took an equal interest with her in such profits, and were entitled to be maintained and educated by her out of such profits; and that, while she had a right to use and enjoy, in common with the children, the house and lot purchased by the executors under the fourth clause, the house and lot were the property of the estate, and subject to distribution under the first clause.

APPEAL from the Chancery Court of Greene.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed for the purpose of obtaining a judicial construction of the will of Robert K. Walthall, deceased, which was in the following words:

"It is my will and desire, that all my property, both real and personal, shall be equally divided between my beloved wife, Margaret, and my three children, share and share alike; that is to say, my said wife shall have one share, and each of my children one share of said property, to be kept together, managed and controlled by my executors and the guardians of my children, hereinafter appointed, until the oldest of my children shall arrive at the age of twenty-one years; at which time, his share shall be set apart in a manner that shall be just and equitable, and conveyed to him; and in like manner, when the next oldest, Sallie Miranda, shall arrive at the age of twenty-one years, or if she should marry at an earlier age, with the approval and consent of her guardian, then shall her share be set apart and conveyed to her; and in like manner, the youngest, when she shall arrive at the age of twenty-one years, or if she should marry at an earlier age, with the like approval and consent of her guardian, then shall her share be set apart and conveyed to her.

"*Item*, it my will and desire that, after all my just debts and liabilities shall have been paid, the said executors and guardians of my children shall pay over to my said wife, from time to time, as she may call for the same, such portion or part of the annual increase or profits of all my said property as she may desire; the remainder to be by them invested for the benefit of my said wife and children.

"*Item*, it is my will and desire, that the tract of land on which I reside, called the 'home tract,'" (particularly describing it,) "shall, on the first day of January, 1853, be sold to L. N. Walthall, and a fee-simple conveyance [be made] to him and his heirs forever, free from any incumbrance of dower or otherwise, (provided the said L. N. Walthall desires to purchase the same,) at the price of twelve dollars and a half per acre; and in the event the said L. N. Walthall shall not desire to purchase the said land at the price mentioned, then it is my will, that the said lands shall be sold at public outcry to the highest bidder, on the first day of January, 1853.

"*Item*, it is my will and desire, that my said executors shall sell, at private or at public sale, for cash or on time, as to them shall seem best, the lot or parcel of land situated in the village of Newbern, in Greene county, purchased by me from Thomas R. Borden, esq., and shall purchase in said village another suitable lot, and shall, prior to the first day of January, 1853, erect, or cause to be erected thereon, a dwelling-house for the residence and benefit of my said wife, after such plan, and in such style as my said wife shall desire and direct.

"*Item*, it is my will and desire, that my said executors shall sell, at an early convenient day, my riding-horse, at private or public sale, for cash or on time, as to them may seem best.

"*Item*, it is my will and desire, that such of my small mule-colts, and old mules unfit for use, as my said executors may think it advisable to sell, together with all my brood-mares and horses, shall be sold at public outcry to the highest bidder, on the first day of January, 1853; except one horse, called *Collum*, one bay mare, called *Biddy*, and the colt of the *Irwin* mare.

"Item, it is my will and desire that, in case of the death of my wife, or of either of my children, before said children shall arrive at the age of twenty-one years, or the marriage of either of my daughters, then the survivors shall have the share that would have been allotted to the deceased; and in the event of the death of all my children, before they shall arrive at the age of twenty-one years, or the marriage of my daughters, my wife surviving, then my said wife shall have the proceeds and profits of all the property during her life; and at her death, all my said property shall be divided equally between my brothers and sisters as may be living, and the children of those that may be dead, except such property as I have acquired, or may acquire, in right of my wife: the property thus acquired, in right of my wife, in the event last above mentioned, shall descend to the heirs of my said wife, in the same manner as if she had never been married.

"Item, it is my will and desire, and I hereby nominate and appoint my trusty friends and beloved brothers, John M. and Thomas M. Walthall, executors to execute this my last will and testament, and the guardians of my children during their minority."

The testator died in Perry county, Alabama, the place of his residence, in September, 1851. His will was admitted to probate, and letters testamentary thereon granted to Thomas M. Walthall, one of the executors therein named, in November, 1851. The personal property of the estate was appraised at about \$50,000; the value of the lands is nowhere stated in the record. In March, 1859, the executor resigned; and the widow having in the meantime married P. C. Wynne, letters of administration *de bonis non*, with the will annexed, were then granted to her and her husband. The bill was filed in June, 1859, by Mr. and Mrs. Wynne, against the two surviving children, (the youngest having previously died,) and their guardian. The children were described in the bill as infants under the age of fourteen years. Answers

were filed by the defendants, submitting to the jurisdiction of the court, and insisting on that construction of the will which was most favorable to the interests of the children.

On final hearing, on bill, answers and exhibits, the chancellor held, that Mrs. Wynne took an equal interest with her children, and no more, both in the annual increase of the property after the payment of debts, and in the house and lot purchased by the executor under the fourth clause; and that, while she was entitled to receive and retain the entire annual profits, she could not invest any portion thereof in property, or otherwise use the same for her own exclusive benefit, but could only expend it in the support of herself and the maintenance and education of the children.

From this decree the complainants appeal, and here insist that the chancellor erred in restricting Mrs. Wynne's use and enjoyment of the property to the purposes above specified, and in holding that the children took an equal interest with her under the second and fourth clauses; while the defendants, under cross-assignments of error by consent, contend that he should have restricted her, under the second clause, to such portion of the annual profits as might be reasonably necessary for her own support, and for the maintenance and education of the children.

BROOKS & GARROTT, for the complainants.

D. W. BAINE, and W. P. WEBB, for the defendants.

A. J. WALKER, C. J.—[July 19, 1860.]—The prime object of search, in the construction of wills, is the testator's intention, which, if legal, is the law of the instrument. To assist in ascertaining the intention, various rules have been framed, one of which, being a suggestion of the plainest common sense, is, "that all the parts are to be construed in relation to each other, and so as, if possible, to form one consistent whole."—2 Jar. on Wills, 741, § 7. The import of other parts of the will, in this case, touching the same subject with the second clause,

must be determined, in order that we may find, if possible, a construction which will give harmonious operation to each.

The first is, obviously, the leading and main clause of the will, to which all the others are rather supplementary, adding those more minute directions, which, on account of its comprehensiveness, could not be embraced in it. The first expresses the general testamentary purpose and plan. The others were designed, not materially to vary that plan, but to adapt the process of executing the will to the condition of the family; to give specific directions as to particulars necessarily omitted in the generality of the first clause, and to anticipate contingencies of death in the family. This general view of the instrument, drawn from a careful reading and comparison of all its parts, will assist in the comprehension of any clause of doubtful construction.

The first clause makes a sweeping bequest of all the testator's property, real and personal, to be equally divided, "share and share alike," between his wife and children; directs that it shall be kept together and managed by the executors, and that the shares of his children shall be set apart to them—the son's, when he attains majority, and the daughters', when they attain majority, or inarry with the consent of their guardians. This clause, while it postpones the time of reception, unquestionably gives an equal vested interest to each one of the testator's family in his entire property, and, of course, in the subsequently accruing profits thereof, unless it is controlled by other parts of the will.—*Cox v. McKinney*, 32 Ala. 461; *High v. Worley*, *ib.* 709; *Thrasher v. Ingram*, *ib.* 645; *Stearns v. Weathers*, 30 Ala. 712; *Savage v. Benham*, 17 Ala. 119.

If the second clause receive such a construction as to bestow upon the widow as much as she desires of the profits of the estate, for her exclusive use, it infringes the first clause, and, in part, abrogates it; for the first clause clearly disposes of all the testator's property in terms comprehending the income as well as the *corpus*, and

requires perfect equality in the division of the entire property between the wife and children. The children were all of tender years at the testator's death; and the payments to the widow, under the second clause, must necessarily be continued through a long period of time. If the widow, during that period, after the payment of the debts, is to receive, at her option, the entire income of the estate, (which, in the interim, may duplicate itself,) in exclusion of her children, the entire spirit and intent of the first clause may be defeated, and the widow may stand, at the time of the division, the recipient of more than double as much as the children, whom the testator designed to favor equally with herself in the bestowment of his bounty.

Certainly, the first clause must yield to the second, if the conflict between them is irreconcilable. But the rule which sacrifices the former of two contradictory clauses, is only applied after the failure of every other attempt to give to both such a construction as will render them equally effective.—*Pace v. Bonner*, 27 Ala. 307; *Miller v. Flournoy*, 26 Ala. 724; *Thrasher v. Ingram*, 32 Ala. 645-660; 1 Jar. on Wills, 416; 2 *ib.* 741. We are to inquire, therefore, whether there is a possible harmonious construction for the two.

The first clause, as we have seen, on account of the generality of its scope, necessarily omitted the adaptation of the process of executing the will to the condition of the testator's family. It made no provision for the maintenance of the widow, or for the support and education of the children, still in infant helplessness, during the protracted period antecedent to the division of the estate. The preservation of the family relation was so obvious, natural, and necessary a result of its condition, that an express provision upon the subject was not required; and the will must have been framed in reference to such result. That it was anticipated by the testator, is indicated in the direction of the fourth clause, for the purchase of a lot in the village of Newbern, and the erection upon it of a suitable house for the residence of the wife. It can

not be supposed, that the testator intended a residence, procured by the executors at the expense of an estate conveyed by a previous clause to the wife and children in equal shares, should be occupied by the wife alone, without the children, whose tender years made them necessary subjects of maternal care. How was it designed that this family of widow and children should be maintained after the discharge of the debts of the estate? The executors could not, consistently with the will, maintain them, either out of the income of the estate, or the *corpus* of the property; for in the second clause there is an unmistakable direction, that so much of the income as the widow may leave shall be invested, and the property itself is required to be kept together and divided at the appointed time. The widow has certainly the means of maintaining herself out of the profits from which she is authorized to draw by the second clause; but how are the children to be maintained and educated? It is impossible that the family should be kept together, in a common residence, and that the widow should maintain herself from the payments to her out of the income, without a participation by the children. The will, in its operation, therefore, necessarily leads to the maintenance of the children out of the fund drawn by the widow from the profits of the estate. This result, so obvious, must have been intended. It is inconceivable, that the testator, having in the second clause directed his attention to the operation of his will upon his family before they could receive their respective shares, should have had regard to his wife alone, and intentionally left his children without a maintenance; and yet he has done that unnatural thing, if the children are not to be maintained out of the profits drawn by the widow; for he follows up the bequest out of the income in favor of the widow, with the direction for the investment of the residue.

For reasons similar to those from which we deduce the children's right to a maintenance out of the income received by the widow, we decide, that she must be restricted as to the purpose for which she may draw upon

the income. The executors must pay over to her as she may desire; but the payments must be for the purpose, and as the means of maintaining herself, and maintaining and educating the children. If the widow is allowed to take the whole of the income, whether desired for those purposes or not, the spirit of equality as between herself and children, which pervades the will, is disregarded; the equality of right declared by the first clause is infringed; the widow, at the time appointed for the division, will receive her share accumulated from the income of the common property of herself and the children, and there will be no remainder of the income to be invested, as contemplated by the last clause of the second item.

If the second clause be so construed as to give to the widow a right to take the profits to the extent of her desire, for the purpose of maintaining herself, and maintaining and educating the children, it merely modifies the operation of the first clause to suit the necessities and condition of the family before the division. Such was the effect which the testator designed it should have. He intended that the widow, in whom he confided, should, without stint or question, draw from the profits for the purposes above stated, and that she should thus be saved from the annoyance and humiliation of having the means of maintaining herself and children measured out to her according to legal rules. He thus provided an equality of benefit for wife and children, consistent with the first clause, and with the spirit of the will, but dispensed with niceness in its adjustment.

In attaining this construction of the second clause, we do not vary the meaning of any of its words. We leave untouched the direction to *pay over* to the widow, from time to time, as she may require, such part of the annual profits as she may desire. We only declare the purpose for which these payments are to be made. In doing this, we are justified by the rules already stated, and by the rule which requires that words should be supplied in order to effectuate the intention.—*Capel v. McMillan*, 8 Porter, 197; 1 Jar. on Wills, 427-437; 2 Wms. on Ex. 932, n. 1.

In the cases of *Kerr v. Hill*, (2 Des. Eq. 279,) and *Crane v. Vandayne*, (1 Stockton's Ch. 289,) a question of construction arose, which was almost identical with that which arises in this case as to the maintenance of the children; and the decision was the same which we make in this case.—See, also, *McLeod v. McDornell*, 6 Ala. 288; *Fitzgerald v. Jones*, 1 Munf. 150.

For reasons which have been already indicated, we construe the fourth clause as investing the widow with the right to use the lot bought and dwelling-house built thereon in pursuance of that clause, and the children have the right to share with her its enjoyment; but the house and lot are the property of the estate, subject to distribution under the first clause.

The decree of the chancellor is affirmed.

WYNNE vs. WHISENANT,

[ACTION ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Duplicity in plea*.—A plea which is double, is not demurrable on that account.
2. *Illegality of consideration of note*.—If the consideration of a note is partly illegal, it avoids the whole note; but the maker, when sued on the note, may nevertheless waive the illegality, and insist on a failure of the consideration.
3. *Presumption in favor of judgment*.—When no pleas appear in the record, the appellate court will presume that proper pleas were filed to let in the evidence which the primary court admitted.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon S. D. HALE.

THIS action was brought by M. W. Wynne, against W. J. Whisenant; and was founded on the defendant's pro-

missory note for \$866 66, dated October 19, 1854, and payable on the 1st day of May next after date, with interest from date. No pleas appear in the record. On the trial before the jury, as the bill of exceptions shows, after the plaintiff had read in evidence the note described in his complaint, "the defendant proved that, a short time before the note was executed, there had been a fight between him and his two sons, on the one side, and the plaintiff on the other; that the plaintiff had sustained considerable personal injury in the fight, and had afterwards sued out a warrant against the defendant and his two sons, before a justice of the peace, for an assault and battery; and then introduced some evidence tending to show, that the consideration of said note was an agreement between plaintiff and defendant, to the effect that plaintiff would stop said prosecution, and would not attend the circuit court, but would go out of the county. The plaintiff introduced testimony tending to prove, that the sole consideration of said note was the injuries inflicted on his person in the fight. The defendant proved that, at the next term of the circuit court for said county, he and his two sons were indicted for said fight; and then proposed to prove, that plaintiff did attend said term of the court, and was examined as a witness in behalf of the State on the trial of said indictment." To each portion of this evidence the plaintiff objected, as illegal and irrelevant; the court overruled his objections, and he excepted. The defendant then proposed to prove, "that in the settlement made between him and the plaintiff, out of which grew the note now sued on, other matters than the said fight were included; stating at the time; that he did not propose to prove what those matters were, but to show that all matters between them were settled." The plaintiff objected to this evidence, as illegal and irrelevant, and reserved an exception to the overruling of his objection. The several rulings of the court on the evidence, to which exceptions were reserved, are now assigned as error.

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JAS. B. MARTIN, for appellant.

ALEX. & JNO. WHITE, *contra*.

STONE, J.—[July 4, 1860.]—If the defendant in this case had pleaded, that the consideration of the note sued on was, that the plaintiff should abandon the prosecution he had instituted against the defendant—should leave the State, and not appear as a witness on the trial, and that the plaintiff, in violation of his agreement, had appeared and given evidence on the trial against defendant,—the plea would, perhaps, be double, and unnecessarily prolix; but a demurrer to it would not be sustained. The plea being in this form, no one, we apprehend, would gainsay the right of the defendant to introduce evidence in support of each averment in the plea.

Again: The case of Kirkman v. Eaton, (35 Ala. 272,) is, at least, an implied authority for the proposition, that one who has a valid defense to an executory contract, on the ground of illegality of consideration, may waive that specific defense, and rely on the averment that the *aggregatio mentium*—the concurrence of minds between the contracting parties—has never been consummated. In the case cited, although the note was executed to be wagered, and was wagered on the result of an election that was pending; yet the plaintiff recovered in the court below, and the judgment was affirmed in this court.

The plaintiff having declared specially on the note in this case, which note purported to be signed by the party sought to be charged, he made out a *prima-facie* case for recovery when he read his note in evidence.—Code, §§ 2278-9. It was competent for defendant, under an appropriate issue, to prove that the consideration was, either in whole or in part, illegal; or, waiving that, to show that the plaintiff had violated his part of the agreement, which furnished the consideration of the promise. If the consideration was in part illegal, it avoided the whole note.—1 Story on Contracts, §§ 569, 459; 1 Parsons on Contracts, 365, note.

In the present record there are no pleas. In such case,

it is our duty to presume that proper pleas were filed to let in the evidence.—Shep. Dig. 572, § 152.

The first and second exceptions of defendant are covered by what we have said above. There is nothing in the third exception. It was certainly permissible for either party to prove the real consideration of the note.

Judgment affirmed.

McGILL vs. MONETTE.

[ACTION AGAINST OWNERS OF STEAMBOAT FOR NEGLIGENCE.]

1. *When bailee may sue in his own name.*—A bailee for reward, having delivered the goods on board his barge to a steamboat, to be carried to their place of destination, may maintain an action in his own name against the owners of the steamboat, for the negligence and carelessness of their servants in the transportation of the goods, whereby plaintiff lost his reward, and was compelled to pay damages to the owners of the goods.
2. *Objection to deposition; when made.*—An objection to a deposition, on the ground that no notice was given of the time and place at which it would be taken, cannot (Code, § 2328) be made when the deposition is offered in evidence on the trial.
3. *Waiver of objection to relevancy of evidence.*—When the bill of exceptions shows that, on the trial before the jury, the defendant contended that the plaintiff was not entitled to recover without proof of a particular fact, he will not be heard, in the appellate court, to allege that proof of that fact was irrelevant, but can only insist that the evidence adduced did not constitute a proper legal means of proving the fact.
4. *Proof of demand by judgment and receipt.*—In an action by the bailee of goods, against the owners of a steamboat, for negligence; the fact in issue being, whether the owners of the goods had demanded of plaintiff compensation for the damage sustained; the record of a judgment recovered by them against him, for the injury to their goods, and their receipt for the money paid by him in satisfaction of their demand are competent evidence to prove the demand.

5. *Limitation of action.*—An action against the owners of a steamboat, for negligence arising from the breach of a contract, is not within the statute of limitations of one year, (Code, § 2481.)
6. *General objection to evidence.*—A general objection to evidence, a portion of which is admissible, may be overruled entirely.
7. *What is revisable.*—In civil causes, the appellate court will not notice any assignment of error which is not insisted on in the argument of the appellant's counsel.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by John W. Monette, against William McGill and Harvey Snow; but was allowed to abate as to Snow, who died before the trial. The complaint contained two counts, in substance as follows: 1. For that whereas, on the 8th December, 1855, plaintiff caused to be delivered to defendants, at their special instance and request, a certain barge laden with eight hundred bushels of corn, the property of plaintiff, and with two hundred and forty-four bales of cotton, the property of divers other persons, which plaintiff had undertaken for a reasonable reward to carry and safely deliver at Mobile, (the dangers of the river only excepted,) to be by said defendants safely towed and carried to Mobile, for a reasonable reward in that behalf; yet said defendants, not regarding their duty in that behalf, conducted themselves so carelessly and negligently in the towing of said barge, that said barge was sunk; whereby plaintiff's corn was destroyed and lost, and said cotton was greatly damaged, and plaintiff thereby lost his reward, and was compelled to pay a large sum of money as damages. 2. For that whereas, on the 8th December, 1855, defendants being the owners of the steamboat 'Osceola,' plaintiff delivered to the captain of said steamboat a certain barge laden with corn and cotton, the property of plaintiff and divers other persons, which plaintiff had undertaken to carry to Mobile, and there safely to deliver in good order, (the dangers of the river only excepted,) and for which he was to receive from the owners

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of said cotton a reasonable reward; which said barge was to be safely towed to Mobile by the defendants' said agent, for a reasonable reward to the defendants in that behalf; yet defendants' said agent, not regarding his duty in that behalf, conducted himself so carelessly and negligently, in and about the towing and carrying of said barge, that the said barge, by reason thereof, was filled with water and sunk; "whereby said corn was greatly damaged and destroyed, and plaintiff's said freight, or a great part thereof, was wholly lost to him, and said cotton was greatly damaged," &c.

The defendants demurred to each count of the complaint, so far as it sought a recovery for the damage done to the cotton of third persons, "because it is no where shown that plaintiff was bound by his contract with said 'divers other persons' to pay them for any damage done to their cotton in its transportation upon his barge; nor, if there was any contract, that the same was known to the defendants; nor that plaintiff was obliged in law to pay them for injury done to their cotton as stated; but said obligation is alleged, as a conclusion of law, from facts not made to appear in either of said counts; and because each count shows that, as to the cotton, the action should have been brought in the owners' name." The court overruled the demurrer; and the defendants then pleaded, in short by consent, the general issue, and the statute of limitations of one year; on each of which pleas issue was joined.

On the trial, as the bill of exceptions shows, the plaintiff offered in evidence the deposition of one Raby, which had been taken on interrogatories and cross-interrogatories, and had been published at the last preceding term of the court. At the time of filing cross-interrogatories, the defendant's counsel had endorsed on the interrogatories in chief these words: "Notice and affidavit waived, and consent given for the issue of a commission; but defendant requires notice to be given to him of the time and place of executing the commission." The defendant objected to the reading of the deposition, because no

notice had been given to him of the time and place at which it was to be taken. The court overruled the motion, on the ground that it came too late; and the defendant excepted.

It was admitted, that the plaintiff's barge, laden with cotton and corn, was delivered to the steamboat *Osceola*, to be towed to Mobile; that while said steamboat was descending the river, with the barge in tow, she was passed by the *Illinois Belle*; that the waves caused by the two boats, in meeting and passing by each other, swept over the barge and sunk it; and that the *Osceola* at that time belonged to the defendant and said Harvey Snow. But the evidence was conflicting, as to the terms of the contract by which the captain of the steamboat undertook to tow the barge, and as to the remote cause of the sinking of the barge. The plaintiff's evidence tended to show, that his barge was properly laden; that the steamboat contracted to tow it safely to Mobile; that the captain of the steamboat afterwards took in tow, against the plaintiff's remonstrances, two barges heavily laden with wood, which were almost in a sinking condition; and that in attaching these barges to the steamboat, the ropes were passed across the plaintiff's barge, in such a manner that it was forced down into the water, and was not able to ride the waves when the other steamboat passed. On the other hand, the defendant's evidence conduced to show, that the plaintiff's barge was too heavily laden; that the captain of the steamboat declined to tow it on that account, and only consented to do so on the plaintiff assuming the risk; and that the barge was sunk in consequence of its being over-laden, and not in consequence of any negligence or unskillfulness on the part of the officers of the steamboat. The plaintiff offered in evidence the records of several suits brought against him by third persons, which, it was admitted, "were brought to recover damages for injuries done to the cotton on his barge when it was sunk, while in tow by the *Osceola*;" and also several receipts for moneys paid by him to other persons, for damages done to their cotton while on his

barge at the same time. The defendant objected to the admission of these judgments and receipts as evidence, "on the ground of irrelevancy;" the court overruled the objections, and allowed said judgments and receipts to be read in evidence, "for the single purpose of showing that the several amounts therein specified had been claimed and demanded of plaintiff, by the several owners of the cotton, for damages done to their cotton while on plaintiff's barge in tow of the *Osceola*;" and the defendant excepted.

The plaintiff introduced one Stollenworth as a witness, who was a partner in the house of J. A. Wemyss & Co. of Mobile, to whom some of the cotton on the plaintiff's barge was consigned; who testified to the price at which the damaged cotton was sold, and to the damage sustained from the submersion in the water. The defendant moved the court to exclude from the jury the entire testimony of this witness, "on the ground that it was not legal evidence," because the witness did not testify to facts within his personal knowledge. The court overruled the objection, and the defendant excepted.

The defendant requested the court to instruct the jury—"1st, that the plaintiff cannot recover for any damage supposed to be sustained by cotton in this transaction, when the owners of such cotton have not demanded any damages of him, and when he has not paid them any damages; 2dly, that if they believe the captain of the steamboat did not contract to tow the barge safely, but that the risk was to be taken by the barge, then the statute of limitations of one year would apply." The court refused each of these charges, but instructed the jury, in connection with the refusal of the second charge, "that unless the plaintiff made out to their satisfaction a contract of towage, he could not recover; and that therefore the statute of limitations of one year had nothing to do with the case;" to which charge the defendant also excepted.

The rulings of the court on the pleadings, on the evidence, and in the charges to the jury, are now assigned as error.

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E. S. DARGAN, with JNO. HALL, for appellant.

ROBERT H. SMITH, *contra*.

R. W. WALKER, J.—[June 7, 1860.].—1. The demurrers to the complaint were properly overruled. Although the plaintiff held the cotton as bailee, yet it was competent for him to sue in his own name on the contract made with the defendants. If it be conceded that his right to sue on this contract is dependent on his liability over to his principals, it is plain that this liability results, as matter of law, from the allegations of the complaint.—Cox v. Easley, 11 Ala. 369; Steamboat Farmer v. McCraw, 26 Ala. 204; Story on Bailments, § 94; 1 Parsons on Contracts, 638; Hare v. Fuller, 7 Ala. 717.

2. The objection to the deposition of the witness Raby came too late.—Code, § 2328.

3—4. The transcripts and receipts were offered, in connection with the written agreement of counsel which is set out in the bill of exceptions, for the single purpose of proving that the owners of the cotton had demanded of the plaintiff compensation for the injury it had sustained while the barge was in tow of the steamer. There is some reason to infer from the bill of exceptions, that this evidence was offered to rebut evidence of a contrary tendency previously introduced by the defendant. However this may be, it does not lie in the mouth of the appellant to say, that the making of such demand by the owners of the cotton was not a matter involved in the issue before the jury, or that the admission of evidence competent to establish that fact should work a reversal of the judgment. The bill of exceptions clearly shows, that one of the matters of defense relied on by the defendant was, that the owners of the cotton had made no demand of compensation; and that he asserted on the trial the legal proposition, that the plaintiff was not entitled to recover without proving such demand. Having thus insisted upon the necessity of such evidence, as essential to make out the plaintiff's cause of action, he cannot now shift his ground, and be heard to say that the very evidence, with-

out which he then claimed that the plaintiff could not recover, was in fact irrelevant and illegal. If, therefore, the fact of demand was irrelevant, the appellant is estopped from saying so. Hence, the only objection which he can here urge to the admissibility of the transcripts and receipts in evidence, is, not that the fact which they were introduced to establish was irrelevant, but that, assuming it to have been relevant, they did not constitute a proper or legal means of proving it. There is nothing in this objection; for it is clear that, in connection with the agreement referred to, the judgments and receipts did tend to show that the parties who obtained the judgments and executed the receipts, had demanded of the plaintiff compensation for the damage done to their cotton. They were, therefore, competent evidence of that fact.—*Darlington v. Borland*, 3 Porter, 9; 1 Greenl. Ev. §§ 528, 538-9; *Harrell v. Whitman*, 20 Ala. 519; *Goodman v. Walker*, 30 Ala. 540.

5. The suit was for damages arising from the breach of a contract. If the plaintiff did not establish the contract, and its breach, he was not entitled to recover. It follows, that the statute of limitations of one year had nothing to do with the case.

6. Some of the evidence of the witness Stollenworth was clearly admissible; and the motion being to exclude the whole of his testimony, there was no error in overruling it.

7. The other assignments of error are not insisted on in the briefs of the counsel for the appellant, and we do not notice them.

Judgment affirmed.

WOOD & KIMBROUGH vs. FOWLER.

[ACTION ON NOTE GIVEN FOR PURCHASE-MONEY OF SLAVE.]

1. *Set-off; nonsuit on verdict for less than \$50.*—In an action on a note given for the purchase-money of a slave, damages for a misrepresentation or breach of warranty of soundness constitute a good set-off, (Code, § 2840;) and if the amount of the plaintiff's recovery is thereby reduced to less than fifty dollars, he cannot be nonsuited under section 2865.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by D. C. Fowler, against John B. Wood and Burrell Kimbrough; and was founded on the defendants' promissory note for \$452, dated the 16th April, 1856, and payable on the 1st January, 1858. The defendants pleaded the general issue, and a special plea in these words: "And for further plea defendants say, that the note sued on was given as part of the purchase-money of a slave named King; which said slave was sold by said plaintiff to the defendant Wood on the 16th April, 1856, and which said slave the plaintiff then and there warranted to be sound in body and mind, when said slave was in fact, at the time of said sale, unsound both in body and mind." The jury returned a verdict for the plaintiff, for one dollar as damages; and the defendants thereupon moved the court to ~~dismiss~~ the suit, on the ground that the verdict was for a less sum than the court had jurisdiction of, while the amount of the plaintiff's recovery had not been reduced "by a set-off successfully made." The court held, that the defense made under the special plea above copied, constituted a "set-off" within the meaning of the statute; and therefore overruled the defendants' motion. The defendants excepted to this decision, and they now assign it as error.

Longmire v. Pilkington.

WATTS, JUDEN & JACKSON, for appellants.

D. W. BAINB, contra.

A. J. WALKER, C. J.—[June 21, 1860.]—Damages for breach of warranty, or misrepresentation of the soundness of a slave, may, under section 2240 of the Code, as construed in *Holly v. Youngs*, (27 Ala. 203,) and *Gibson v. Marquis*, (29 Ala. 668,) be set off against the note given for the slave, when sued upon by the seller. The defense that such damages have been sustained, when thus brought forward, may with strict propriety, under our system, be denominated a set-off; and we must understand it as being a set-off within the meaning of section 2265, in order that that section and section 2240 may have a harmonious operation.

Judgment affirmed.

LONGMIRE vs. PILKINGTON.

[TROVER FOR CONVERSION OF HORSE.]

1. *When guardian may sue.*—Under the provisions of the Code, (§§ 2086, 2132,) a guardian may sue in his own name, for the use of his ward, to recover damages for the conversion of the ward's property.
2. *Amendment of complaint.*—Under the provisions of the Code, (§§ 2402-3,) where the summons is in the name of the plaintiff individually, the complaint may be so amended as to show that he sues as guardian of a minor, and for the use of his ward.

APPEAL from the Circuit Court of Monroe.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by James Pilkington, against Garrett M. Longmire and Richard F. Longmire, to recover damages for the conversion of a horse. In the

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original complaint, the plaintiff sued in his own right, and alleged that the horse was his property. An amended complaint was afterwards filed, in which the plaintiff was described as "James Pilkington, as guardian of Margaret Pilkington, a minor, and who sues for the use of said Margaret Pilkington;" and the horse was alleged to be the "property of the plaintiff as aforesaid." There is no bill of exceptions in the record; but the judgment-entry of the term, at which the amendment was allowed, is in these words: "Plaintiff has leave to amend his complaint, by adding to his name the words, 'as guardian,' &c.; to which the defendants except." The defendants afterwards demurred to the amended complaint—"1st, because said complaint shows on its face no cause of action in the plaintiff as guardian; 2d, because the suit is not brought in the name of the ward, by next friend; 3d, because the complaint shows no cause of action in plaintiff; 4th, because the ward cannot sue, in this form of action, by guardian; 5th, because the complaint does not allege property in the plaintiff; and, 6th, because the complaint shows on its face that the property is in the ward." The court overruled the demurrer. The allowance of the amendment, and the overruling of the demurrer to the amended complaint, are now assigned as error.

ANDERSON & BOYLES, for appellants.

S. J. CUMMINS, *contra*.

STONE, J.—[Feb. 28, 1861.]—The Code (§ 2036) declares, that "guardians may sue in their own names, for the use of the ward, in all cases where the ward has an interest, and the judgment enures to his benefit." The amended complaint in the present case discloses an interest in the ward; and if its averments be true, the judgment will enure to her benefit. The case, then, as made by the amendment, is precisely within the letter of the section of the Code above copied, if that section be not qualified by some other provisions of the Code. It

is contended, that section 2182 qualifies section 2086. We think we give operation to the latter section, (2182,) when we declare that it would evidently govern suits by infants who have no guardian. They "must sue by their next friend." Possibly there are other cases to which section 2182 would apply.

We hold, then, that, in suits like the present, the guardian "may sue in his own name, for the use of the ward."

Section 2130 of the Code relates to suits "brought in the name of the person having the *legal title*, for the use of another." A guardian, as such, has not the legal title of his ward's estate; and, hence, that section can exert no influence on suits like the present.—Sutherland v. Goff, 5 Por. 508; Hooks v. Smith, 18 Ala. 841.

[2.] If the amendment was properly allowed, we need not inquire whether the record sufficiently raises the question of its allowance.—See Bryan v. Wilson, 27 Ala. 308; Felkel v. Hicks, 32 Ala. 25. The alteration in this case was not an entire change, or substitution of one party plaintiff for another. Such change, under our decisions, would not be allowed.—Leaird v. Moore, 27 Ala. 326; Friend v. Oliver, *ib.* 532; Dwyer v. Kinnemore, 31 Ala. 404; Pickens v. Oliver, 32 Ala. 626. The amendment simply changed the character in which the plaintiff sued, by showing that he declared, not in his own right, but in that of another, upon whose title the statute permits him to recover. In Crimm v. Crawford, (29 Ala. 626,) we said, "To amend the complaint, so as to show the capacity in which the plaintiff sues, produces no inadmissible departure from the summons; for, notwithstanding the summons is, under the decisions of this court, deemed as one in favor of the plaintiff as an individual, yet it is permissible for the plaintiff, upon general process, to declare as an administrator."—See, also, Agee v. Williams, 30 Ala. 636. The principle settled in Crimm v. Crawford, *supra*, is well sustained by authorities, many of which are therein cited. We cannot distinguish between the right to amend in that case, and in this; and, hence, we hold,

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that the amendment was properly allowed in the present case.

Judgment affirmed.

WILLIAMSON & McARTHUR vs. WOOLF ET AL.

[ACTION ON OFFICIAL BOND OF JUSTICE OF THE PEACE.]

1. *Authority of intendant of Camden as justice of the peace.*—The 4th section of the act "to incorporate the town of Camden in Wilcox county," (Session Acts, 1841, p. 54,) taken in connection with the act "to incorporate the town of Eutaw in Greene county," to which it refers, although it may not make the intendant of the town, *ex officio*, a justice of the peace, constitutes at least a valid foundation for a *bona-fide* claim of office by him; and if he proceeds to perform the duties of a justice of the peace, on the faith of his election as intendant, he is at least a justice *de facto*.
2. *Estoppel by bond.*—The sureties on a bond, which recites that the principal obligor "has been duly elected intendant of the town of C., and is thereby made *ex officio* a justice of the peace," are estopped, when sued on the bond for the default of their principal, from alleging that he was not a justice of the peace; it appearing that he was at least a justice *de facto*, and received much business as a justice on the faith and credit of the bond.
3. *Validity and consideration of bond of officer de facto.*—A bond, executed by the intendant of an incorporated town, with others as his sureties, which recites that, by virtue of his election as intendant, he "is thereby made *ex officio* a justice of the peace," and is conditioned for the faithful discharge of his duties as such justice, will be upheld as a common-law obligation, (although there is no law requiring the intendant to give bond,) when it appears that he was at least a justice *de facto*, and that the bond is supported by a sufficient consideration; and if it was given for the purpose of procuring for the intendant patronage and business as a justice of the peace, and he did receive patronage and business as a justice on the faith and credit of it, it is supported by a sufficient consideration.
4. *Demurrer to complaint assigning good and bad breaches.*—In an action on a penal bond, if the complaint contains a single count, assigning several breaches, the insufficiency of one of the assignments is not a ground of demurrer to the entire complaint.

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APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was founded on a penal bond, executed by John D. Catlin, jr., (since deceased,) D. S. J. Woolf, and J. A. Blakeney, dated the 7th June, 1854, payable to the State of Alabama, and conditioned as follows: "Whereas the above-bound John D. Catlin, jr., has been duly elected intendant of the town of Camden in said county, and is thereby made, *ex officio*, justice of the peace; now, therefore, should the said Catlin well and truly do and perform all the duties which are, or may be, required of him by law as such intendant, or, *ex officio*, justice of the peace, then this obligation to be void," &c.

The amended complaint was in the following words:

"Plaintiffs claim of defendants the sum of \$665 78, for the breach of the condition of a bond," &c., describing it, and setting out the condition. "Plaintiffs say, that the said bond was delivered to the probate judge of Wilcox county, and was by him approved; that the said bond was given by the said Catlin for the object and purpose of securing to him thereby patronage and business as a justice of the peace; that the said Catlin did, on the faith and credit of said bond, receive much patronage and business as a justice of the peace, and was thereby benefited, by reason of the large amount of costs and fees which he obtained from said official patronage and business, so secured to him by reason of said bond; that, according to the recitals of said bond, said Catlin was an acting justice of the peace *ex officio*, as aforesaid, for Wilcox county, by virtue of his office as intendant of the town of Camden, from the date of said bond, (June 7th, 1854,) until October 13th, 1855; that, during said period, divers claims, the property of plaintiffs, were placed in the hands of said Catlin, as justice of the peace *ex officio* as aforesaid, for suit and collection; and that the condition of said bond has been broken by said Catlin, in this: that the said Catlin, as such justice of the peace

ex officio as aforesaid, during the said time he was an acting justice of the peace *ex officio* as aforesaid, to-wit, between the 7th June, 1854, and the 13th October, 1855, had and received officially and ministerially, for and on account of the plaintiffs, divers sums of money on the claims above mentioned, amounting in the whole to the sum of \$665 78; and that he, the said Catlin, did not pay the said sum of money, or any part thereof, to the said plaintiffs, or to any person or persons authorized to receive the same, but wholly failed, neglected, and refused so to do, to the damage of the plaintiffs as above stated." (The opinion of the court renders it unnecessary to set out the second assignment of a breach.) "Plaintiffs further say, that all the said sums of money collected by said Catlin, as above set out, were demanded of him before the commencement of this suit, to-wit, on or about the 11th July, 1854, the 23d October, 1854, and the 29th December, 1855; and that said several sums of money, so collected by said Catlin, became and were due and owing from said Catlin as justice of the peace *ex officio* as aforesaid, before the commencement of this suit, and before the date of said demands, and are still in arrears and unpaid, contrary to the form and effect of said writing obligatory, and of the said condition thereof; by reason of which said breach of said writing obligatory, the same became forfeited; whereby an action hath accrued to the said plaintiff, to have and demand of the said defendants the said sum above claimed, with the interest thereon."

The defendants demurred to the complaint—"1st, because said Catlin was not, by virtue of his office as intendant of the town of Camden, a justice of the peace, *ex officio*, for the county of Wilcox, and therefore said bond is contrary to law and void; 2d, because the intendant of the town of Camden was not, at the time said Catlin executed said bond with defendants, required to give bond, and therefore said bond is without consideration and void; 3d, because the condition of said bond is insensible, uncertain, and therefore void; 4th, because the complaint

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does not allege that said Catlin was a justice of the peace in and for Wilcox county; 5th, because the first count in said complaint is argumentative, states legal conclusions, and does not aver a demand; 6th, because the second count is insensible, uncertain, and void for repugnancy; and, 7th, because said second count does not aver a demand." The court sustained the demurrer, and its judgment is now assigned as error.

The 4th section of the act, "to incorporate the town of Camden, in the county of Wilcox," is in these words: "*Be it further enacted*, that the powers, privileges, rights and immunities, conferred by an act, entitled 'An act to incorporate the town of Eutaw, in Greene county,' approved January 2d, 1841, are hereby transferred to, and vested in, the intendant and council of the town of Camden, in the county of Wilcox."—See Session Acts 1841, page 54.

J. HENDERSON, for appellants.—1. The charter of the town of Camden, taken in connection with the charter of the town of Eutaw, to which it refers, makes the intendant, *ex officio*, a justice of the peace; and section 710 of the Code requires justices of the peace to give bond, according to the provisions of section 118. The bond here sued on is thus shown to be a good statutory bond; and its validity, as a statutory bond, is not affected by the superadded condition for the faithful discharge of the principal obligor's duties as intendant, which will be rejected as surplusage.—10 Mis. 664; 5 Barr, 250; 1 Brock. 195; *ib.* 177; *Whitsett v. Womack*, 8 Ala. 466, and cases there cited. The doctrine invoked by the appellee's counsel, as to a clause of reference in a statute, has no application, since all the powers conferred on the intendant are special; and if it were held applicable at all, it would take away all power from him.

2. If the obligation is not good as a statutory bond, it is certainly good at common law. The State has power, independent of all statutory provisions, to take a bond

from one of its officers, conditioned for the faithful discharge of his public duties; and the courts will lend their assistance to indemnify parties who have been injured by the officer acting under such bond.—5 Peters, 115; 3 Wheaton, 172; 1 Bailey, 211; 7 Conn. 543; 6 Birney, 292; Gilpin, 554; 1 Greenl. 248; 5 Pick. 384; 15 How. (U. S.) 304; 3 Cush. (Mass.) 625.

3. The allegations of the complaint show a sufficient consideration for the bond.—1 Saunders' Pl. & Ev. 195; Chitty on Contracts, 30; Hester v. Keith, 1 Ala. 316; Gayle v. Martin, 3 Ala. 593; Whitsett v. Womack, 8 Ala. 466; 5 Pick. 384.

4. Catlin having enjoyed the benefits arising from the bond, the defendants are estopped from alleging its invalidity.—Sprowl v. Lawrence, 33 Ala. 688; 8 Ala. 466; 7 Ohio, 354; 2 Har. (Penn. St.) 83; 16 Mass. 102; 1 Rich. (S. C.) 281.

J. L. THOMPSON, with whom was ALEX. WHITE, *contra*.

1. The civil jurisdiction of a justice of the peace is an extraordinary power, and must be conferred by statute, since it did not exist at common law.—Ellis v. White, 25 Ala. 540; Marshall v. Betner, 17 Ala. 836. A clause of reference in a statute embraces only the general powers and provisions of the statute referred to, and not its special and particular clauses.—*Ex parte* Greene & Graham, 29 Ala. 52; Stevenson v. O'Hara, 27 Ala. 362; Matthews, Finley & Co. v. Sands & Co., 29 Ala. 181; Dwarries on Statutes, 705. From these propositions it necessarily follows, that the charter of the town of Camden does not make the intendant, *ex officio*, a justice of the peace. Any other construction of the charter would make each member of the common council, equally with the intendant, a justice of the peace; and would authorize them to act in that capacity, not in Wilcox, but in Greene county. Moreover, the 8th section of the subsequent act to amend the charter of Camden, (Session Acts 1857-8, p. 225,) which expressly confers on the intendant the powers of a justice of the peace, is a legislative construc-

tion of the original charter, showing that it did not confer that power.

2. The complaint does not aver, that Catlin was a justice of the peace for Wilcox county; and if he was in fact a justice, by virtue of his election as intendant, there is no statute which required or authorized him to give bond. The provisions of the Code do not apply to the case, because his term of office, mode of election, &c., are entirely different from those of justices of the peace under the Code, and are governed by a special statute which was passed before the adoption of the Code.

3. All the specified grounds of demurrer are insisted on.

R. W. WALKER, J.—[March 9, 1861.]—We do not deem it necessary to determine, whether by the act "to incorporate the town of Camden in Wilcox county," (Acts 1841, p. 54,) the intendant of the town is made, *ex officio*, a justice of the peace. On that point, the law may be conceded to be as the appellees contend; and yet it would be of no avail to them in this suit.

It is not always easy to determine what is necessary to constitute an officer *de facto*. The general definition is, that he is one who exercises the duties of an office, under color of an appointment or election to that office; though Lord Ellenborough, in the leading case on the subject, says, that an officer *de facto* "is one who has the reputation of being the officer he assumes to be, and yet is not a good officer in point of law."—*The King v. The Corporation of Bedford Level*, 6 East, 366. It is very clear, that the 4th section of the act to incorporate the town of Camden, when taken in connection with the act to which it refers, constitutes at least a valid foundation for a *bona-fide* claim by the intendant of the town, to be *ex officio* justice of the peace; and if, on the faith of his election as intendant, he proceeds to perform the duties of justice of the peace, he would not be considered a naked usurper without claim or right. If not a mere usurper, he would be at least an officer *de facto*.—*People v. Cook*, 14 Barb.

316; Jones v. Bebee, 9 Mass. 231. It follows, that if the principal obligor in the bond was elected intendant of the town of Camden, and, on the authority of that election, assumed to act, and did act as a justice of the peace, he became at least a justice, *de facto*, if not *de jure*. This being so, a bond executed by him, and conditioned for his faithful discharge of the duties of justice, will be upheld as a valid obligation; and those who have voluntarily bound themselves as his sureties, cannot absolve themselves from liability by alleging that he was no justice.—Sprowl v. Lawrence, 33 Ala. 688, and authorities cited.

[2.] The doctrine of estoppel has sometimes been assailed, as tending to defeat justice by excluding truth. But certainly no rule of the common law is better supported by reason and sound policy, than that which declares, that when a man solemnly admits a fact, and the admission is acted upon, he shall not be heard to gainsay it, with a view of escaping from liability. The bond in this case expressly declares, that Catlin "has been duly elected intendant of the town of Camden in said county, and is thereby made *ex officio* justice of the peace;" and the complaint avers, that Catlin performed the duties of the office of justice, and that on the faith and credit of this bond he received "much patronage and business as a justice of the peace." By signing his bond, the defendants acknowledged him to be a justice of the peace, recommended him as such to the public, and agreed to be liable if he did not well and truly perform the duties of the office. They at least, whatever might be the case with others, will not be heard to say that, although they signed his bond, and thereby induced others to place claims in his hands, still he was not in fact a justice of the peace. On that point "their mouths are shut."

[3.] Even if it be true, that there was no law, requiring the intendant of the town of Camden to give bond; that would not affect the validity of the instrument, as a common-law obligation.—Sprowl v. Lawrence, 33 Ala. 692; Alston v. Alston, 34 Ala. 24-5, and authorities cited; Stephens v. Crawford, 1 Kelly, 582. The com-

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plaint shows a sufficient consideration for the bond.—
34 Ala. 24.

[4.] The complaint contained but a single count, assigning several breaches. In such a case, the insufficiency of one of the breaches assigned is not a ground of demurrer to the entire complaint. Hence, we need not inquire, whether the second breach was good.—Governor v. Wiley, 14 Ala. 172; Wilson v. Cantrell, 19 Ala. 642.

The court erred in sustaining the demurrer. The judgment is, therefore, reversed, and cause remanded.

HOPKINSON vs. SHELTON.

[TROVER AGAINST SHERIFF.]

1. *Requisites of plea.*—It is no objection to a special plea, under our system of pleading, that it presents matter which is available under the general issue, which is also pleaded.
2. *Plea of former recovery.*—A plea of former recovery must show that the cause of action in the two suits is the same.
3. *Same; conclusiveness of judgment as bar.*—The recovery of a judgment against a sheriff and his sureties, in an action on his official bond, by two joint owners of a chattel, for his wrongful acts in selling the entire interest in the chattel under execution against one of the joint owners, and in making the sale at a place not authorized by law, is a bar to a subsequent action of trover against him, by the joint owner who was not a party to the process, for the conversion arising from the wrongful sale of the entire interest; and the conclusiveness of the bar is not affected by the fact, that only nominal damages were recovered in that action; nor by the further fact, that the action itself was not strictly maintainable.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by C. B. Hopkinson, against James T. Shelton, to recover damages for the conversion

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of certain cattle, which the defendant, as sheriff of said county, had seized and sold under execution against one F. B. Sheppard. The defendant pleaded, 1st, the general issue; 2d, justification under the execution against Sheppard, averring that the cattle were the property of said Sheppard, and were liable to sale under the execution; and, 3d, a special plea in the following words: "8. And for a further plea, defendant says, that said plaintiff ought not further to have or maintain his said action against him, because he says, that the said plaintiff and F. B. Sheppard instituted a suit, in their joint names, against this defendant, as sheriff, and his sureties on his official bond, on the same day this suit was brought, to recover damages for the defendant's selling the same cattle, for the conversion of which this suit is brought, under an execution, issued from the city court of Mobile, in favor of one W. R. Smith, against said Sheppard; and that at the present term of this court, to wit, on the 28th March instant, said suit was tried, and a recovery was had against this defendant for the sale thereof, and damages assessed against this defendant and his sureties, in favor of said plaintiff and said Sheppard; and he avers, that this recovery was for the sale of the same cattle, for the conversion of which this suit is brought; which said recovery still remains of record, in full force; and he pleads this recovery in bar of the further prosecution of this suit, and prays judgment," &c. The plaintiff took issue on the first plea, and demurred to the others—1st, because said second and third pleas are repugnant; 2d, because said second plea amounts to the general issue, as pleaded in the first plea; 3d, because, as to the third plea, it does not set out the record with sufficient certainty; 4th, because said third plea does not show that the suit, on which the recovery therein pleaded was had, was between the same parties; 5th, because it does not show that the cause of action for which this suit is brought, was, or could have been, tried in said former suit; 6th, because it does not show that the cause of action in said former suit was the same as that on which

a recovery is sought in this action; 7th, because it does not show that the recovery sought in this action was, or could have been, had in said former suit; 8th, because it does not show that the merits of this action were, or could have been, tried in said former action; 9th, because it does not show that the judgment in the former suit has been satisfied; and, 10th, because it does not show what were the issues decided in the said former action." The court overruled the demurrer, and the plaintiff then replied *nul tiel record*; and it was agreed, that any other appropriate special replication should be considered as filed, and that any special matter might be given in evidence.

On the trial, as the bill of exceptions shows, the plaintiff proved the joint ownership of the cattle by himself and F. B. Sheppard, the levy of an execution on them by the defendant, as sheriff, against said Sheppard individually, and the sale of them under said execution, on the 25th October, 1858, as the sole and separate property of Sheppard. The defendant then read in evidence the record of the former suit brought by the plaintiff and said Sheppard jointly, against the defendant and the sureties on his official bond, together with the bill of exceptions reserved by the plaintiffs in that case, and the decision of the supreme court thereon rendered; "and it was admitted, that the same cattle constituted the subject-matter of both suits." It was agreed, also, that the decision of the supreme court in the former case might be read from the printed report, (84 Ala. 552-59,) as if incorporated in the bill of exceptions in this case.

"This being all the evidence in the cause," the court charged the jury, at the instance of the defendant—"1st, that if they believe the cattle sued for are the same cattle for the sale of which the suit of Hopkinson & Sheppard v. Shelton *et al.* was brought, the record of which suit was read in evidence, then the plaintiff cannot recover; 2d, that if the cattle belonged to Hopkinson and Sheppard as partners, the suit of Hopkinson & Sheppard v. Shelton *et al.* is a bar to this suit." The plaintiff excepted to these

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charges; and then requested the court to instruct the jury—"1st, that the verdict and judgment in the suit of Hopkinson & Sheppard v. Shelton *et al.* is conclusive evidence, in this suit, of the plaintiff's interest in the cattle; 2d, that if Hopkinson and Sheppard were joint owners of the cattle, and the defendant, as sheriff, sold said cattle as the sole and exclusive property of Sheppard, under an execution against him individually, and Sheppard & Hopkinson recovered only nominal damages in the former action, when, by reason of the misjoinder of plaintiffs, they were by law entitled to none,—then the recovery in that suit is no bar to this suit; 3d, that if Hopkinson & Sheppard owned the cattle jointly, and the defendant, as sheriff, sold the entire property under execution against Sheppard individually, they must find for the plaintiff; 4th, that the verdict and judgment in the former suit is no bar to the plaintiff's recovery in this action; 5th, that if the evidence in this suit would not have sustained the action in the former suit, then the judgment in that suit is not a bar in this; 6th, that the plaintiff in this action could not have recovered in the former suit the demand claimed in this, and, therefore, was entitled to recover in this suit for the value of his interest in the cattle; and, 7th, that the jury must find for the plaintiff, under the facts of this case." The court refused each of these charges, and the plaintiff excepted to their refusal.

The overruling of the demurrer to the second and third pleas, the charges given to the jury, and the refusal of the several charges asked, are now assigned as error.

H. F. DRUMMOND, for appellant.

DARGAN & TAYLOR, *contra*.

A. J. WALKER, C. J.—[March 22d, 1861.]—Under our system of pleading, which allows the filing of a plurality of pleas, it is no objection, that a special plea presents matter of defense available under the general issue, which is also pleaded;—*Dunham v. Riddle*, 2 St. & P. 402; Code, § 2237; Pamphlet Acts of 1853–54, p. 60. The refusal of this court to reverse, on account of the

erroneous sustaining of a demurrer to a plea, where the general issue was pleaded, and the defense might have been made under it, is put, not upon the ground that the special plea was objectionable, but that no injury resulted from the erroneous action of the court.—*Rogers v. Brazeale*, 34 Ala. 512. There is a common-law rule, "that where a plea amounts to the general issue, it should be so pleaded;" but it is probable that the enforcement of that rule was discretionary with the court.—*Stephens* on Pl. 419-422, ch. 2, § 6. It was no valid objection to the second plea, that it amounted to the general issue.

[2.] The third plea, setting up a former recovery, does not show that the cause of action in the two suits was the same. The cause of action in this case, is the conversion of the cattle mentioned. The cause of action, alleged to have been the basis of the former recovery, is the sale of the same cattle by the defendant as sheriff. It is not averred, that the conversion, for which this suit was brought, was identical with the sale, for which the other suit was brought. There may have been an actionable conversion altogether distinct from the sale. The court erred in overruling the demurrer to this plea.

[8.] The main question before us is, whether the recovery of nominal damages, in the case of *Hopkinson and Sheppard v. Shelton*, (the decision of which in this court is reported, under the title of *Sheppard v. Shelton*, in 34 Ala. p. 652,) is a bar to this suit, when it is shown that the conversion of cattle for which this suit is brought was effected by the levy upon the same by the defendant, as sheriff, under *feri facias* against Sheppard alone, and the subsequent sale of the same under the execution; and that such sale was the sale for the making of which the former suit was brought by the plaintiff and Sheppard, they being joint owners of the cattle. To determine this question, it is necessary to ascertain what is the legal cause of action in this suit. The sheriff, having an execution against Sheppard alone, had authority to levy on the cattle, which were the joint property of the defendant in execution and the plaintiff in this case, and to hold

possession of the same until the sale.—*Andrews v. Keith*, 34 Ala. 722; *Moore v. Sample*, 3 Ala. 319; *Winston v. Ewing*, 1 Ala. 129. The cause of action in this case, therefore, is not a conversion produced by the levy, taking and retaining of the property up to the sale. The sheriff's conduct was legal, up to the time of sale. A sale of the entire property, under an execution against one of the joint owners, would render the sheriff a trespasser as to the joint owner who was not a defendant in the execution; and this is the cause of action, which would accrue to the plaintiff, upon the facts stated in the question above propounded.—*Sheppard v. Shelton*, 34 Ala. 652; *Smyth v. Tankersley*, 20 Ala. 212.

If the wrongful sale of the property was the cause of action in the former suit, and a recovery was thereupon had, it is a bar to this suit. It can make no difference, that the form of action was different.—*Starkie on Ev.*, part 2, p. 198; *Tarleton & Pollard v. Johnson*, 25 Ala. 300; *Langdon v. Raiford*, 20 Ala. 532. Nor does it affect the question, that, in strictness of law, the plaintiff's right could not have been properly adjudicated in the former action, if it was in fact set up and passed upon, in a court of competent jurisdiction, at the plaintiff's instance. *Tarleton & Pollard v. Johnson*, *supra*. Nor does it make the former suit less effective as a bar, that in it the court, by an erroneous ruling, diminished the plaintiff's recovery down to merely nominal damages.—*Smith v. Whiting*, 11 Mass. 445; *Planter v. Best*, 11 Johns. R. 530; *Philips v. Berlok*, 16 Johns. R. 136; *Brockway v. Kinney*, 23. 210.

The cause of action in the former suit was the sale of the entire property in the cattle, by virtue of process against one of the owners, and at a place not authorized by law. The charge of the court authorized a finding by the jury of the damage resulting from such sale, but required a deduction from the damage of so much of the proceeds of sale as was paid over on the execution by the sheriff; and instructed the jury, that, if the property sold for as much as it would have sold for at a place pre-

scribed by law, and the proceeds of the sale were all paid over on the execution, then they must find nominal damages for the plaintiff. The jury found nominal damages. The court also refused to separate Hopkinson's interest from that of the defendant in execution, and allow a recovery of his damages. We think, that the plaintiff's damages, resulting from the sale, alleged to have been wrongful for the two reasons—that the entire property was sold under an execution against one owner, and that the sale was at a wrong place,—were considered and adjudicated; and that, under the charge, those damages were reduced to a nominal amount, because the property sold for its value, and the proceeds of the sale were paid over on the execution. The plaintiff cannot again have his claim for damages on account of the wrongful sale adjudicated; and if this suit be for the same sale, it is barred by the former judgment. And upon the principles stated above, this case is not relieved from the bar, because the form of action in the former suit was different; nor because the action was not, in strictness of law, maintainable; nor because the court, in the former case, erroneously ruled, that the plaintiff's damages were subject to reduction to a nominal sum.

We have adopted what we conceive to be the *prima-facie* construction of the record in the former suit. We do not consider, for we do not think it necessary, whether parol proof would be admissible to show that, in fact, the subject-matter of this suit was not adjudicated.

We do not deem it necessary to decide any other question in the case.

Judgment reversed, and cause remanded.

BEENE'S ADM'R vs. PHILLIPS, GOLDSBY & BLEVINS.

[CONTEST BETWEEN CREDITOR AND ADMINISTRATOR OF INSOLVENT ESTATE.]

1. *What constitutes sufficient filing of claim.*—A claim against an insolvent estate, on the affidavit verifying it, must be regarded as filed, within the meaning of the statute, (Code, § 1847,) when it is delivered to the probate judge, or to his acting clerk, in his office, to be placed and kept on file; but merely placing it in the office, not with the proper file of papers belonging to the estate, and without bringing it to the notice of the judge or his clerk, is not a sufficient filing.

APPEAL from the Probate Court of Dallas.

In the matter of the estate of Benjamin Y. Beene, deceased, which was declared insolvent on the 12th April, 1858; and against which the appellees filed a claim, on the 22d. November, 1858. The administrator filed a written objection to the allowance of this claim, "on the ground that the same had not been verified in the time and manner required by law;" and an issue was formed on this objection. On the trial, as appears from the bill of exceptions, the plaintiffs produced an affidavit of the justice and non-payment of their claim, made before a justice of the peace, on the 16th December, 1858; and proved by one Roberts, who was the acting clerk in the office of the probate judge, "that some time after the time for filing claims against said estate had expired, to-wit, after the lapse of nine months from the declaration of insolvency, plaintiffs' attorney came into the office of the probate judge, and requested witness to look and see whether there was any affidavit to said claim; that they both looked in a box, in which all claims against insolvent estates were kept, and said attorney there found the affidavit above mentioned, but not in the file of papers belonging to said estate; and that he (witness) had never

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Before seen said affidavit. Said affidavit was not marked *filed*; nor was there any evidence that the attention of the probate judge, or of any one acting for him, had ever been called to it; nor was any other evidence offered in relation to the filing of said affidavit, or the verification of said claim. This being all the evidence, the court overruled the objection of the administrator, and allowed said claim; to which said administrator excepted," and which he now assigns as error.

WHITE & PORTIS, for appellant.

JAS. Q. SMITH, and JNO. T. MORGAN, *contra*.

STONE, J.—[Feb. 26, 1861].—A claim, and its verification, delivered to the judge of probate, or to his acting clerk, in his office, to be placed and kept on file, must be regarded as "*filed*" within the meaning of section 1847 of the Code. Merely placing such paper in the office, not with the proper file of papers belonging to the particular estate, and without bringing such paper to the notice of the judge or his clerk, would not be a filing within the spirit of the statute.

The evidence before the probate court, without more, does not prove that the affidavit verifying the claim in this case, was *filed* in the office of the probate court within the time allowed by law.

Reversed and remanded.

WOOD vs. BARKER.

[ACTION ON ATTACHMENT BOND, FOR DAMAGES.]

1. *Malice, and vindictive damages*.—In an action on an attachment bond, if the attachment was not vexatious as against the defendant in the process, the fact that the attaching creditor was actuated by

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malice towards a third person, who, though a joint obligor with the defendant in attachment, was not a party to the process, affords no ground for the recovery of vindictive damages:

2. *Admissibility of declarations, as part of res gesta.*—The declarations of the plaintiff in attachment, to his attorney, as to his reasons for suing out the process, made at the time of suing out the writ, are admissible evidence, in an action on the attachment bond, as a part of the *res gesta*.

3. *General objection to evidence.*—A general objection to evidence, a part of which is admissible, may be overruled entirely.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by William Wood, against Stephen B. Barker and others, the sureties of said Barker; and was founded on an attachment bond, executed by the defendants, in a suit previously brought by said Barker against the plaintiff in this suit. The attachment bond was conditioned as the statute prescribes. The breaches alleged in the complaint were—1st, that the attachment was not prosecuted to effect, but was dismissed by the plaintiff therein; 2d, that said attachment was wrongfully sued out; and, 3d, that said attachment was vexatiously sued out. Issue was joined, as the bill of exceptions states, “on each breach of the plaintiff’s complaint.” On the trial, after the plaintiff had proved the issue of the attachment, its levy by service of garnishment, and the dismissal of the attachment suit, in vacation, before the commencement of this suit,—“he offered one Gibson as a witness, who was a joint obligor with him on the note which was the foundation of the attachment-suit, and offered to prove by him, that said Barker told him (witness), after said attachment was sued out, that he sued out said attachment to vex and harass him (witness), and to injure him in his standing in the community, because he had refused to go security for said Barker on a replevy bond. The court refused to allow the witness to prove said Barker’s declarations to him, and the plaintiff excepted.” The defendant introduced as a witness one of his attorneys in the attachment suit,

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"by whom he proposed to prove his reasons for suing out said attachment, as stated at the time to said attorney, and the reason why the attachment suit was dismissed. The plaintiff objected to this evidence, but the court overruled the objection. The witness testified, that the defendant's reason for suing out said attachment, as stated to him at the time, was, that the plaintiff had deceived him as to his ability to pay, and he was afraid that Gibson alone was not able to pay the debt; and that the attachment suit was dismissed, by his advice, because the affidavit on which it was founded was defective." The plaintiff objected to this evidence, and reserved an exception to the overruling of his objection. The several rulings of the court on the evidence, to which exceptions were reserved, are now assigned as error.

GEO. W. GAYLE, for appellant.

THOS. H. LEWIS, *contra*.

R. W. WALKER, J.—[July 24, 1860.]—If the attachment was not vexatious as against the defendant himself, the fact that the attaching creditor was actuated by malice against some third person, not a party to the process, affords no ground for the recovery of vindictive damages in this suit.

[2-3.] A part of the testimony of the witness Williams consisted of the declarations which the defendant made at the time the attachment was issued, as to his reasons for having it issued. These declarations were admissible as part of the *res gestæ*.—*Pitts v. Burroughs*, 6 Ala. 735-6, and cases cited; *Dearing v. Moore*, 26 Ala. 590; *Sanford v. Howard*, 29 Ala. 695. The exception taken was to the admission of the whole of the witness' evidence; and, as part of it was admissible, this court will not reverse, even if other portions of it were illegal. On that point, however, it is not necessary for us to express an opinion.

Judgment affirmed.

KANNADY vs. LAMBERT.

[ACTION ON PROMISSORY NOTE, BY ENDORSEE AGAINST MAKER.]

1. *Error without injury in sustaining demurrer to special plea.*—The sustaining of a demurrer to a special plea, if erroneous, is not available to the defendant, when the record shows that he had the full benefit of the same defense under the general issue.
2. *What is available under general issue.*—In an action on a note given for the purchase-money of land, a promise by the vendor to cancel and destroy the note, in consideration of the fact that the land was subject to overflow, when he had represented that it was not, is available as a defense under the plea of the general issue; but the vendor's misrepresentations as to any material matter, which constituted an inducement to the purchase, and on which the purchaser relied, is only available under a special plea of set-off, by virtue of section 2240 of the Code.
3. *Plea of fraud.*—In an action on a note given for the purchase-money of land, a special plea, averring the vendor's misrepresentation as to a material matter, and consequent injury to the purchaser, but containing no averment that such misrepresentation misled the purchaser, or constituted an inducement to the purchase, or was relied on by him, fails to make out a case of fraud.

APPEAL from the Circuit Court of Coosa.

Tried before the Hon. PORTER KING.

THIS action was brought by John M. Lambert, against A. T. Kannady; and was founded on the defendant's promissory note, of which the following is a copy:

"\$1100. On or before the 1st January, 1856, I promise to pay Samuel Lambert, or bearer, the sum of eleven hundred dollars; to be paid in cotton, at eight cents per pound the crop round, on the plantation, or at the nearest convenient gin, for value received of him this 15th November, 1855; being for land—south half of section twelve, township twenty-four, range eighteen; with interest from 1st January, 1856."

"A. T. KANNADY."

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The defendant pleaded—1st, that the plaintiff was not the party really interested in the suit; 2d, the statute of limitations of six years; 3d, the general issue; and, 4th, a special plea in these words: "Defendant denies each and every allegation in said declaration contained, and avers, that said note was given for the purchase-money of the south half of section twelve, township twenty-four, range eighteen; that Samuel Lambert, the payee of said note, represented to defendant, at the time of said purchase, that no part of said lands overflowed, when in fact a great portion of said lands did overflow, and said Lambert well knew that fact; and that said defendant was thereby greatly damaged, to more than the amount of said note. And defendant avers, that afterwards," &c., "before the transfer of said note, defendant offered to rescind said contract, and to give up said land to Samuel Lambert; and that said Samuel Lambert declined and refused to rescind said contract, but promised and agreed with said defendant, in consideration of the fact that said land did overflow, and of his false representations as aforesaid, to allow him a deduction on the purchase-money of said land, amounting to the entire sum of said note, and further agreed to give up, cancel and destroy said note." To this special plea the plaintiff demurred, on the following specified grounds: "1st, because said plea does not show that said defendant was induced to purchase on account of said alleged false representations; 2d, because said plea purports to answer the whole cause of action, and concludes to a part only; 3d, because it is argumentative; 4th, because, it is double; and, 5th, because it is repugnant, and contains matter that is surplusage." The court sustained the demurrer, and the cause was tried on issue joined on the other pleas.

The sustaining of the demurrer to the 4th plea is here assigned as error, together with the rulings of the court on the evidence, and in the charges to the jury.

L. E. PARSONS, for the appellant.

N. S. GRAHAM, contra.

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A. J. WALKER, C. J.—[July 4, 1860.]—The fourth plea first denies all the allegations of the complaint. So far as this denial is concerned, there was no prejudice to the defendant from sustaining the demurrer to the plea; for it presented no defense not available under the general issue, which was also pleaded. So, also, the agreement to cancel and destroy the note, in consideration of the overflow of the land for which the note was given, and of the false representation as to that matter, could have been given in evidence under the general issue; and the plaintiff sustained no prejudice from the demurrer so far as that defense was concerned.—1 Chitty on Pl. 478; Stedham v. Stedham, 32 Ala. 525; Fail & Miles v. McArthur, 31 Ala. 26. Besides these two matters, however, the plea contains allegations to the effect, that the note was given for the purchase-money of a tract of land; that the vendor represented, at the time of the purchase, that the land was not subject to overflow; that a great portion of it was subject to overflow; that the vendor knew that fact, and that the defendant was thereby damaged, to an extent beyond the amount of the note. We have, in this part of the plea, the averment of a misrepresentation as to a matter which seems to have been material, and of injury to the entire amount of the note, but no averment that the misrepresentation misled the defendant, or that it constituted an inducement to the defendant to make the contract of purchase, or was relied upon by the defendant. On account of the failure to make such averment, the plea fails to make out a case of fraud.—Pritchett v. Munroe, 22 Ala. 501; S. C., 16 Ala. 785; Bailey v. Jordan, 32 Ala. 50; Foster v. Gressett, 29 Ala. 398; Read v. Walker, 18 Ala. 328; Cozzins v. Whittaker, 3 S. & P. 322; 2 Chitty on Pl. 687, 688, 689. There was, therefore, no reversible error in rejecting any of the three matters of defense brought forward in the plea. Since the adoption of the Code, the defense of fraud is available, under the plea of set-off, to a note given for the purchase-money of the land; but a set-off is only available under a special plea. The defendant, having no special plea of

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set-off, cannot have the advantage of this defense by virtue of the provision of the Code alluded to. The defense against the vendor's suit for the purchase-money, on the ground of fraud, could not, under our system, be made under the general issue; for it is no defense at law, as held in numerous cases, except by virtue of the provision of the Code which allows a set-off of any reciprocal cause of action not sounding in damages merely.—*Kelly's Heirs v. Allen*, 34 Ala. 663.

There was no error in the exclusion from the consideration of the jury of the vendor's misrepresentations, as there was no issue upon which they were admissible. The bill of exceptions does not show that the evidence offered by the defendant, as to the payee of the note being about to leave the country in May, 1857, was relevant to the issues before the jury. Not being able to perceive the relevancy of the evidence, we cannot hold that the court erred in excluding it.

Judgment affirmed.

UNION INDIA RUBBER COMPANY vs. MITCHELL.

[GARNISHMENT ON JUDGMENT.]

1. *Execution of bill of exceptions.*—A bill of exceptions, which is without date, and which is not shown by the record to have been signed within the time prescribed by the statute, (Code, § 2356,) will be rejected, on motion, as forming no part of the record.
2. *What irregularities are available to plaintiff in garnishment.*—The allowance of a set-off claimed by the garnishee, against the claims admitted by him to be due to the defendant, or to his transferee, is not a matter of which the plaintiff can complain on error, when the record shows that he contested the transferee's right to the claims, and that the jury found the issue in favor of the transferee.

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APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAY. COOK.

THE appellant in this case, having recovered judgment against Jones & Co., (a mercantile firm in Selma, composed of Abner Jones and William Ickes,) sued out process of garnishment on it, and summoned John T. Morgan, the administrator of William M. Murphy, deceased, as the debtor of said Jones & Co., or either of them. The garnishee answered; admitting that said Jones had presented to him, as administrator, several claims against his intestate, amounting in the aggregate to about \$507; stating that he had been notified by Jones, since the presentation of said claims, that they had been transferred to one John Mitchell, as collateral security against a note for \$1000, executed by said Jones as principal, and by said Murphy and others as sureties; and claiming the benefit of a set-off which he held against these demands. Mitchell having been brought in on notice, an issue was formed between him and the plaintiff, respecting the right to the transferred claims. The jury found the issue in favor of Mitchell; and the court thereupon rendered the following judgments:

"This day came the plaintiff and the claimant, by their attorneys; and issue being joined upon the claim asserted by the said Mitchell, thereupon came a jury," &c., "who," &c., "upon their oaths, do say, 'We, the jury, find the issues in favor of the claimant.' It is therefore considered by the court, that said plaintiff is not entitled to have and recover of the garnishee anything upon his answer filed in this cause; and it is further considered and adjudged, that said claimant, John Mitchell, go hence, and recover of the plaintiff his costs in this behalf expended," &c.

"In this case, the parties came, by their attorneys; and the garnishee having proved that, before the issue of the garnishment in this cause, and before the transfer to John Mitchell of the claims set forth in said answer, it was agreed between Abner Jones, who was the sole owner of

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the claims presented by him to said Morgan, as the administrator of said Murphy, that all the demands set forth in said answer, in favor of said Murphy, against said Abner Jones, Jones & Ickes, Ickes & Co., and Jones, Huffman & Milton, should be a good and valid set-off against the claims of said Jones against the estate of said Murphy; and it also appearing to the satisfaction of the court, that the balance due from said Morgan, as such administrator, after deducting said set-off, is \$80 46, and that said balance was transferred by said Jones to said Mitchell, before the issue of said garnishment,—it is therefore considered by the court, that said John T. Morgan, as such administrator, go hence discharged, and recover of the plaintiff and James Q. Smith, his surety, the costs of this proceeding," &c.

These judgments were rendered on the 9th June, 1858. There is a bill of exceptions in the record, which is without date, and does not purport to have been signed in term time; but is marked by the clerk, "Filed 20th June, 1858."

The judgments above copied; and the several rulings of the court to which exceptions were reserved, are now assigned as error.

ALEX. & JNO. WHITE, with JAS. Q. SMITH, for the appellant, argued the several assignments of error; and, on the motion of the appellee's counsel to strike the bill of exceptions from the record, submitted these views: The act of 1844 required, that the bill of exceptions should be affirmatively shown to have been signed in term time, or within ten days thereafter by consent.—Wood v. Brown, 8 Ala. 564. But the language of the Code (§ 2358) is materially different from that of the former statute. Here is an act of a judicial officer of the State, done in his official capacity, but at what time does not appear; if done within a certain time, it was a matter of official duty, the refusal to perform which was a misdemeanor, (Code, § 2356); if done afterwards, it was a

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plain violation of his official duty. Under these circumstances, this court must presume that the officer performed his duty, and not that he violated it.—4 Phil. Ev. (O. & H. Notes,) 459-61.

JNO. T. MOREAN, *contra*, insisted that the bill of exceptions could not be regarded as a part of the record, and cited the following cases: Wood v. Brown, 8 Ala. 563; Kitchen v. Moye, 17 Ala. 148, 394; Haden v. Brown, 22 Ala. 572; Murrah v. Br. Bank at Decatur, 20 Ala. 392.

STONE, J.—[Feb 13, 1861.]—The bill of exceptions found in this record is without date; and the record contains no evidence that it was signed in term time, or within ten days afterwards, pursuant to written consent of the parties for that purpose.—Code, § 2056. A motion has been made to exclude the bill of exceptions; and under these circumstances, a majority of the court holds, that the exceptions cannot be regarded as a part of the record.—Kitchen v. Moye, 17 Ala. 148; Haden v. Brown, 22 Ala. 572; Cox v. Whitfield, 18 Ala. 788.

[2.] The bill of exceptions being excluded, the case is brought down to narrow limits. On an issue between the plaintiff and transferree, the jury have affirmed the validity of the transfer; and the court thereupon discharged the garnishee. Whether the court correctly ruled on the subject of the garnishee's right of set-off, we need not inquire, as that is a subject which does not concern the present appellant. If, therefore, the court committed any error, (which we do not decide,) it was an error to the prejudice alone of the transferree; and he alone would be heard to complain of it, in a contest between these parties.

Judgment affirmed.

BURNS vs. HUDSON.

[BILL IN EQUITY BY FEME COVERT, FOR RECOVERY OF SLAVES, AS PART OF SEPARATE ESTATE, WITH ACCOUNT OF HIRE, &c.]

1. *Husband's marital rights in and to wife's personally.*—Prior to the adoption of the statutes of this State securing to married women their separate estates, if a slave was given by a father to his married daughter, or was purchased by the daughter at the administrator's sale of her father's estate, and was not in either case settled to her separate use, the husband's marital rights attached, and the slave became his absolute property.
2. *Variance between allegations and proof.*—The bill alleged, that the slave in controversy, in which the complainant claimed a separate estate under a contract between her husband and one J., was sold, conveyed, and delivered by her husband to said J., in consideration of the latter's agreement to become surety for him in a certain law-suit, and to pay whatever judgment might be recovered against him; "and that whatever might be left of the value of the negro, and her hire, after satisfying the judgment that might be recovered against B. (the husband), and the girl herself, if she was not taken to satisfy the judgment, J. was to convey to, and settle upon complainant, in her own right, and as her own sole and separate estate, and to her heirs." The proof was, that B. delivered the slave to J. to indemnify him against his liability as surety for the costs of the law-suit, "upon condition that, if the suit should go against B. the negro was to be sold, and the proceeds of sale to be first applied to the payment of the costs of the suit, if necessary, and the residue, if any, to be paid over to the complainant; but, in the event that B. gained the suit, the negro was to be put in the possession of the complainant, as her own and separate property, and J. was to transfer to her all the title, interest and claim that he had to the negro, for her separate use and benefit." Held, that there was a fatal variance between the allegations and proof.
3. *Same.*—So, where the bill alleged, that J., in pursuance of his previous contract with B., verbally sold and delivered the slave to the complainant, as her separate estate, in consideration of her promise to secure and indemnify him against his liability as surety for B. in the law-suit; while the proof only showed, that he delivered the slave to her, and said that he made no further claim to the slave,—the variance was held fatal.
4. *Same.*—So, where the bill alleged, that the complainant afterwards delivered the slave to the defendant, upon his promise and agree-

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ment to indemnify J. against his liability as surety for B., to satisfy whatever judgment might be recovered against B., to keep the slave hired out at a specified price, to return her to the complainant after it was ascertained what he had to pay on the judgment against B., if the negro was not taken to satisfy the judgment, and to account for her hire; while the proof showed, that the defendant's agreement was to take the place of J. as surety for B., and to dispose of the slave, at the termination of the suit, in like manner as J. was to have disposed of her under his agreement with B., as above stated,—the variance was held fatal.

5. *Dismissal without prejudice*.—The complainant in this case being a married woman, suing by her next friend, and there being a fatal variance between the allegations and proof, the bill was dismissed without prejudice.

APPEAL from the Chancery Court of Calhoun.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Mrs. Mahulda Burns, the wife of A. S. Burns, suing by her next friend, against Samuel P. Hudson and the said A. S. Burns; and sought a recovery of certain slaves in the possession of Hudson, in which the complainant claimed a separate estate, with an account of their hire. The complainant asserted title to the slaves under a verbal gift from her father, in South Carolina, in 1831, of the female slave who was the mother of all the others; a subsequent purchase of said slave at the administrator's sale of her father's estate, in South Carolina, prior to the year 1840; a verbal contract between her said husband and one John P. Jennings, made some time during the year 1842 or 1843, by which Jennings obtained the possession of said slave; a subsequent verbal contract between Jennings and herself, by which she obtained the possession of the slave; and a verbal contract, of later date, between herself and the defendant Hudson, under which she delivered the slave to him. The defendant Hudson denied the title asserted by the complainant, and claimed title in himself under a purchase from said Jennings and A. S. Burns, made in the presence, and with the consent of the complainant. The material allegations of the bill, and the substance of the evidence, are stated in the opinion of the court. On final hearing, on

pleadings and proof, the chancellor dismissed the bill; and his decree is now assigned as error.

JOHN WHITE, for the appellant.

G. C. WHATLEY, *contra*.

R. W. WALKER, J.—[July 4, 1860.]—There is no doubt that, when the contract was made between A. S. Burns and John B. Jennings, the negro girl Lucy was the property of the former; for, whether we consider the original source of title, as a gift from Mrs. Burns' father to her, or as her purchase at the administration sale, it is plain that, as the slave was in no way settled to the separate use of the wife, the marital rights of her husband attached, and the property became his absolutely.

[2.] If, then, Mrs. Burns has now a separate estate in the slave, or can justly claim a settlement of the same to her separate use, she must deduce her right from the transactions with John B. Jennings, or from the subsequent contract with the defendant. However well founded such a claim may be in point of fact, it can be of no avail to the complainant in this suit; for the reason, that the allegations and proof, in reference to the matters which form the foundation of her title to relief, if she has any, do not correspond.

The amended bill alleges, that the complainant's husband, being engaged in a law-suit, or law-suits, with one Hindman, sold, conveyed, and delivered the girl Lucy to John B. Jennings; and that Jennings, as a consideration therefor, contracted and agreed to become surety for Burns in said suit, or suits, in some way, and to pay whatever might be recovered against Burns; and whatever might be left of the value of the negro, and her hire, after satisfying the judgments that might be recovered against Burns, and the girl herself, if she was not taken to satisfy the judgments, Jennings was to convey to and settle upon complainant in her own right; and as her own sole and separate estate, and to her heirs. The only evidence in relation to the contract between Burns and John B. Jennings, is the testimony of

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William M. Jennings, the son of John B., who states, that his father became surety for Burns, for costs, in a law-suit between Burns and one Hindman; and that to indemnify Jennings, Burns delivered the negro Lucy into his possession, upon condition, *that if the suit should go against Burns, the negro was to be sold, and the proceeds of the sale first applied to the payment of the costs of the suit, if necessary, and the residue, if any, to be paid over to the complainant; in the event, however, that Burns gained the suit, the negro was to be put in the possession of the complainant, as her own and separate property, and Jennings was to transfer to her all the title, interest, and claim that he had to the negro, for her separate use and benefit.*

[3.] The bill further alleges, that in 1843 Jennings, by a verbal contract, sold and delivered the negro Lucy to complainant, as her separate estate, and to her heirs, in pursuance of his previous contract with Burns, in consideration of the promise of complainant "to secure and indemnify, and cause to be secured and indemnified, the said Jennings against all loss and liability, as surety for Burns in the suit or suits above-named." The only evidence introduced to support this allegation, is the testimony of Wm. M. Jennings and Mrs. Cowart. The first-named witness states, that on a particular occasion in 1848, and in the presence of the defendant, Mrs. Cowart, and the witness himself, John B. Jennings remarked, that defendant was willing to take his place as surety, and asked the complainant if she was willing; to which she gave her assent. Jennings then said to her, "There is your negro woman; take her, and dispose of her as you choose." Mrs. Cowart says, that Jennings remarked to the complainant, that he now delivered her negro girl to her, and made no further claim to her. There is no evidence of an agreement, on the part of the complainant, to secure Jennings against loss as surety for Burns, which is the *alleged* consideration for the transfer; nor is anything said as to a delivery to the separate use of the complainant. Certainly, the transaction, as proved, was

not an execution of the original contract between Burns and Jennings.

[4.] The bill further alleges, that upon the same day on which Jennings delivered the girl to complainant, or shortly thereafter, the complainant and defendant made a contract, by which the complainant agreed to, and did, deliver the negro Lucy to the defendant, and the defendant agreed to secure and indemnify Jennings as surety for Burns, and to pay and satisfy whatever judgments might be recovered against Burns; "that to make him safe in so doing, he would take the girl into his possession—that he would keep her hired, at some good house, at six dollars per month; that he would return the girl to complainant, after it was ascertained what he would have to pay on whatever judgments might be recovered against Burns in said cases in order to save Jennings harmless, if said negro was not taken to satisfy the judgments that might be recovered therein; and upon that agreement, and that he would also account to complainant for the hire of said girl, the defendant took possession of said girl." The only proof to sustain this allegation, is the testimony of the same witness, J. M. Jennings, who states, that he delivered the negro to Hudson, for complainant; and that the slave was to be disposed of in the hands of Hudson, at the termination of the law-suit between Burns and Hindman, in like manner as she was to have been by John B. Jennings. He further states, that it was agreed, that Hudson should take the place of Jennings as surety, and become liable in like manner as Jennings. Now, looking to the testimony of the same witness, to ascertain the manner in which the girl was to have been disposed of by Jennings at the termination of the suit between Burns and Hindman, we find that the agreement was, that "if the suit should go against Burns, the negro was to be sold, and the proceeds of the sale first applied to the payment of the costs of the suit, if necessary, and the residue, if any, to be paid over to complainant. In the event that Burns gained the suit, the negro was to be put in the possession of complainant, as her separate

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property." The difference between this contract, and that which the complainant alleges she made with Hudson, is obvious.

It is evident from this review of the allegations of the bill, and the evidence adduced in support of them, that in regard to each one of the successive transactions through which the complainant seeks to deduce her claim to relief—the original contract between Burns and Jennings, the subsequent transfer of the slave by Jennings to the complainant, and the contract between the complainant and defendant—the case as stated is not the case which is proved. Consequently, there was no error in dismissing the bill.

[5.] The evidence, however, does, as we have seen, tend to show that the defendant obtained possession of the negro under an agreement that he should take in all respects the place of Jennings—that is, that he was to become bound for Burns in like manner as Jennings had been; and that, at the termination of the law-suits, he would make the same disposition of the negro which, by his contract with Burns, Jennings had agreed to make. Without in any manner committing ourselves to the validity of any claim which complainant may assert as growing out of these facts, we think that, under all the circumstances of the case as disclosed by the record, it is proper that the bill should be dismissed without prejudice. Accordingly, the decree of the chancellor is reversed, and a decree here rendered, dismissing the bill without prejudice.—*Danforth v. Herbert*, 33 Ala. 499; *Singleton v. Gayle*, 8 Porter, 270; *Cameron v. Abbott*, 30 Ala. 419; *Lang v. Waring*, 25 Ala. 625; *Edwards v. Edwards*, 30 Ala. 394. The complainant's next friend must pay the costs, both of this court, and of the court below.

A. J. WALKER, C. J., not sitting.

BUSH AND WIFE vs. CUNNINGHAM'S EXECUTORS.

[PROCEEDING BEFORE PROBATE COURT FOR RECOVERY OF LEGACY.]

1. *Bequest to creditor, with direction for deduction of debt from legacy.*—

Where the testator, after making certain specific bequests to his wife, directed that the residue of his property, both real and personal, should be divided into three equal parts, bequeathed one of these parts to the children of a deceased brother, and added to the bequest these words: "*but the amount I now am indebted to them is deducted,*"—held, that this clause did not impose upon the children an abandonment of their debts against the estate, as a condition upon which they should take the legacy, but only required a deduction of the debts from the legacy; that in making this deduction, the aggregate amount of the debts must be subtracted from the entire legacy to the children collectively; and that the amount to which the children were entitled under the bequest must be ascertained as in cases where property is brought into hotchpot—that is to say, after deducting the specific bequests to the widow, the amount of the debts due to the children must be first added to the general residuum of the estate, and then deducted from one-third of that amount.

2. *Burden of proof.*—In a proceeding before the probate court, after the expiration of eighteen months from the grant of letters testamentary, for the recovery of a residuary legacy, from which is to be deducted, by the terms of the bequest, a debt due from the testator to the legatee, it is incumbent on the legatee, and not on the executor, to prove the amount of the indebtedness to him; and unless he makes such proof, and thereby shows that there will be a sufficiency of assets remaining in the hands of the executor to pay all the debts, charges, and prior legacies, he is not entitled to a decree.

3. *Election; jurisdiction of probate and chancery courts over proceedings for recovery of legacy.*—Where a residuary legacy contains a clause directing a debt due from the testator to the legatees, arising from the fact that he had made an unauthorized sale of their interest in a tract of land, to be deducted from the amount of the legacy; and some of the legatees are infants, and, consequently, incapable of electing to ratify the sale,—the chancery court alone can make an election for them, and is, therefore, the appropriate forum for the settlement of the estate and the ascertainment of the legacies.

Bush and Wife v. Cunningham's Executors.

APPEAL from the Probate Court of Talladega.

In the matter of the estate of John H. Cunningham, deceased, on the petition of A. C. Bush and Mary, his wife, (formerly Mary Cunningham,) D. F. Shuford and Cynthia, his wife, (formerly Cynthia Cunningham,) John B. Cunningham and Victoria Cunningham, for the recovery of a legacy, which they claimed under the second clause of the will of said John H. Cunningham, deceased, which, after making several specific bequests to the said testator's wife, was in the following words: "The remaining portion of my estate, both real and personal, not bequeathed, is to be in three equal parts; W. J. Cunningham is to have one third; James M. Montgomery, Julia Jackson, and Evaline Lane, one third; and the other third to my brother's, Ansel Cunningham, deceased, children; but the amount I now am indebted to them is deducted, both real and personal." The plaintiffs claimed as children of said Ansel Cunningham, deceased, and filed their petition after the lapse of eighteen months from the grant of letters testamentary. The executors, who were made defendants to the proceeding, "pleaded the general issue, with leave to give in evidence any special matter which might be pleaded in bar, and with like leave to the petitioners in reply."

On the hearing of the petition, the plaintiffs read in evidence the will of the testator, with its probate, the inventory, sale-bill of a portion of the personal property, and allotment of the slaves by commissioners under an order of the court; and proved the solvency of the estate. "The defendants then offered to prove, that said John H. Cunningham, the testator, was the executor of his father, who, by his will, left his real estate to his widow for life, and after her death it was to be equally divided among his children, seven in number, one of whom was said Ansel Cunningham, the father of the petitioners; that said John H., before the death of his father's widow, purchased all the interests, except that of said Ansel Cunningham, and that of W. J. Cunningham,

one of the defendants in this proceeding; that he afterwards purchased the share of said W. J. Cunningham; that he sold said land after the death of the widow, and made a fee-simple deed for the whole tract, with covenants of warranty to protect the title; that this was done after the death of said Ansel Cunningham, and with the consent of his widow and such of his children as were of full age,—he, the said John H., to pay them one-seventh of the amount for which he sold it; that he did this as fast as the children came of age, and also paid to the widow of said Ansel the share to which she was entitled under the laws of Georgia." The plaintiffs objected to this evidence, as illegal and irrelevant; the court overruled their objections, and they excepted. The defendants offered to prove, also, "that the said John H. Cunningham was also the executor of his mother, who, at her death in 1851-2, bequeathed \$1200 to the children of said Ansel Cunningham; and that the said John H., up to the time of his death, paid all the said children, as they came of age, their respective shares of this legacy." This evidence the court admitted, against the objection of the petitioners, and they excepted. It was admitted that the names, ages, &c., of all the parties, were correctly stated in the petition; that all of the petitioners were of full age when the petition was filed; that two of them were under the age of twenty-one when the testator died, and that he had never paid either of these two anything on account of his indebtedness to them. The other children of said Ansel Cunningham, who were not before the court as parties, were alleged in the petition to be under the age of twenty-one years. This being all the evidence, (except some parol testimony as to the testator's instructions to the person who wrote the will, which requires no particular notice,) the court dismissed the petition, and the petitioners excepted.

The decree of the court, and its rulings on the evidence, are now assigned as error.

JAS. B. MARTIN, for appellants.

L. E. PARSONS, and JNO. WHITE, *contra*.

A. J. WALKER, C. J.—[July 3, 1860.]—The clause subjoined to the bequest to the children of Ansel Cunningham—"but the amount I now am indebted to them is deducted, both real and personal"—does not exempt the testator's estate from the payment of the debts due to the children of Ansel Cunningham, or impose upon them the abandonment of those debts as a condition upon which they should take the legacy. Its entire effect is to require a deduction from the legacy of the amount of the debts. If it required an abandonment of the debts, there would be a loss of the debts to those children, as well as a deduction of the amount. The children have a right to collect the debts from the estate; but, in ascertaining their legacy, there is to be a deduction of the amount of the debts. We understand [the clause to require that a deduction from the entire legacy of the children collectively is to be made of the gross or aggregate amount of the indebtedness, and not that there is to be a deduction from the several shares of the respective children of the distinct amounts which may be due them separately. The deduction is evidently made a common burden upon all the children.

In ascertaining the legacy to be divided among the children of Ansel Cunningham, the following is the plan to be pursued: After the satisfaction of the debts and expenses and cost of administration, the bequests to the widow must be taken out; then, to the residuum must be added the amount of the testator's indebtedness to the children of Ansel Cunningham, and the residuum thus increased must be divided into three equal parts; of these three parts, one must be assigned to William J. Cunningham, one to James M. Montgomery, Julia Jackson, and Evaline Lane, to be equally divided between them; and the remaining third, after deducting the amount of the indebtedness before added to the residuum, must be equally divided among the children of Ansel Cunningham. The indebtedness to the children of An-

sel Cunningham must be brought into hotchpot; otherwise, there would be a balance not distributed under the will,—a result which it was evidently the purpose of the testator to avoid. This will be apparent upon making a review of the process of distribution upon a different plan. Let the actual residuum, after the deduction of the widow's legacy, be divided into three equal parts, and then let a sum equal to the indebtedness to Ansel Cunningham's children be deducted from their share, and there would be an intestacy as to the sum deducted. This result, which is inconsistent with the testator's intention, is avoided by adding the amount to be deducted to the residuum to be divided into three equal parts.

From this exposition of the plan of calculation to be adopted, it becomes clear, that proof as to the amount of the testator's indebtedness to the children of Ansel Cunningham is indispensable to the ascertainment of their distributive share; and it is totally impossible to determine what is the distributive share of those children, or any one or more of them, without such proof; and it is equally impossible to determine, in the absence of such proof, whether the probate judge could, with safety to the estate, decree to them, in advance of a final settlement, any definite amount on account of their legacies; for it may be that the aggregate amount of the indebtedness will absorb the legacy.

[2.] It was shown that the testator was indebted to the above-named children on two accounts; but as to the amount of indebtedness on one account there was no proof. The *onus* of making that proof was upon the petitioners. The amount of the indebtedness was a matter which we must presume to have been as much within the knowledge of the petitioners, as of the executors. It was not defensive matter, to be brought forward by the executors. It was an element to be affirmatively considered in ascertaining whether the petitioners were entitled to the decree sought. Under section 1775, it devolved upon the petitioners to show that they were legatees, and that after the payment to them of some

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amount there would be a sufficiency of assets to pay all the debts, charges, and other legacies entitled to priority. This, we decide, they have not done.

[3.] A part of the testator's indebtedness to the children, mentioned in the will, arises out of the fact of his making an unauthorized sale of their interest in a tract of land. Those who are infants have not elected to ratify the sale and take their share of the purchase-money, and are incapable from infancy of making that election. An election can only be made for them by the chancery court. The amount of indebtedness depends upon that election. It would, therefore, seem that the appropriate forum for the settlement of the estate and the ascertainment of the legacies of the above-named children would be the chancery court.

Decree affirmed.

TILLMAN vs. CHADWICK.

[TRESPASS BY OWNER AGAINST HIRER OF SLAVE.]

1. *Hirer's authority to punish slave, and liability for abuse of that authority.*—In the absence of qualifying stipulations in the contract of hiring, the hirer acquires the master's authority to inflict reasonable punishment on the slave; and in determining what is a reasonable punishment,—a question which admits of no certain and uniform solution,—regard must be had to the nature of the offense, and to the temper of the slave while receiving the punishment; since obstinacy, refractoriness, or rebelliousness on his part justifies severer punishment than would otherwise be right and proper.
2. *Charge misleading jury.*—A charge to the jury, asserting that, if the punishment inflicted by the hirer on a slave "was beyond what was right and proper under the circumstances, then the onus was on him to prove that he was authorized by the slave's conduct to whip him thus severely, and beyond what would have been right and proper,"—is calculated to mislead and confuse the jury, and is properly refused.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by William L. Tillman, against Dickinson Chadwick, to recover damages for injuries inflicted on a slave. At the time of the commission of the alleged trespass, the slave was in the defendant's possession, under a contract of hiring. The only error assigned is, the refusal of the circuit court to give, at the instance of the plaintiff, the following charge:—"If the jury believe, from all the facts and circumstances of the case, as gathered from the testimony, that the punishment inflicted by the defendant on the slave was improper, and beyond what was right and proper under the circumstances, the *onus* was on him to prove that he was authorized by the slave's conduct to whip him thus severely, and beyond what would have been right and proper;" to the refusal of which charge the plaintiff reserved an exception.

B. H. BAKER, and D. CLOPTON, for the appellant.
GOLDTHWAITE, RICE & SEMPLÉ, *contra*.

STONE, J.—[Jan. 30, 1861.]—It is a settled doctrine of the law, that the owner of a slave, and whoever rightfully stands in his place, is "of necessity invested with authority to inflict on such slave reasonable punishment for the breach of police regulations."—*Gillian v. Senter*, 9 Ala. 395. The hirer of a slave, when there are no qualifying stipulations in the contract of hiring, is, for the time being, armed with the power of the owner in this respect.—*Nelson v. Bondurant*, 26 Ala. 341; *Hall v. Goodson*, 32 Ala. 277.

What is reasonable punishment, and when it can be affirmed that correction has gone beyond this boundary, and become unreasonable and cruel, is a question which admits of no certain and uniform solution. Absolute obedience and subordination to the lawful authority of the master, are the duty of the slave; and the master or

hirer may employ so much force as may be reasonably necessary to secure that obedience. The law cannot enter into a strict scrutiny of the precise force employed, with the view of ascertaining that the chastisement had or had not been unreasonable. Still there is a boundary, and the force must not be grossly disproportionate to the offense. Much must depend on the nature of the transgression in the first instance, and on the temper of the slave while receiving the punishment. On the other hand, the master, hirer, or overseer, should ever bear in mind, that the main purpose of correction is, to reduce an offending and refractory slave to a proper state of submission, respect (and obedience to legitimate authority. This chastisement should be so attempered and applied as to secure the end aimed at, with as little risk of permanent injury or danger to the slave or his owner as is reasonably compatible with the surroundings.—See *Dave v. The State*, 22 Ala. 23; *Eskridge v. The State*, 25 Ala. 30; *Hogan v. Carr*, 6 Ala. 471.

Punishment for a past offense, which is inflicted with a view to reformation, should be graduated by the nature of the offense; and somewhat by the fact, whether the offense has been of frequent or rare commission. We mean this remark for cases where the slave submits without obstinacy to the proper correction. Should the slave prove rebellious or refractory, more severity would doubtless be necessary, to secure proper reformation and example. In this way, legitimate punishment may sometimes be carried much beyond what the offense in the first instance would seem to render necessary.

We suppose the idea last above suggested was probably had in view by the counsel who asked the charge in this case, the refusal to give which raises the only question which this record presents for our consideration. The substance of the charge asked was, that if the whipping was beyond what was right and proper, then the onus was on the defendant to show that the negro's conduct was such as to authorize his hirer to whip him beyond what was right and proper. Now, the negro's con-

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duct might possibly be such as to justify much greater correction, than would under ordinary circumstances be right and proper; yet, this would only show that much greater chastisement, under some circumstances, would be right and proper, than would be under less aggravating circumstances. Under no state of case could it justify correction beyond what was right and proper.

The charge asked was calculated to confuse and mislead the jury, and was rightly refused by the court.—*Shep. Digest*, 462, §§ 61, 62, 68.

Judgment of the circuit court affirmed.

COX vs. MOBILE & GIRARD RAILROAD COMPANY.

[ACTION ON PROMISSORY NOTE, BY ENDORSEE AGAINST MAKER.]

1. *Discharge of surety by new contract between creditor and principal debtor.*—A new contract between the creditor and the principal debtor, made without the consent of the surety, and founded upon valuable consideration, by which the time of payment is extended, discharges the surety, although no other day of payment is fixed.
2. *Same; usury.*—An agreement by the principal debtor to pay usurious interest in future, in consideration of the creditor's promise to extend the day of payment, being void, does not discharge the surety; whether the actual payment of usurious interest by the principal, would discharge the surety, *quære?*

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by the appellee, a corporation chartered by the legislature of this State, against William Cox, and was founded on a promissory note for \$1448 97, executed by one A. D. Cleckley and the defendant, dated

the 15th April, 1850, and payable on the 1st January, 1851, with interest from the 1st January, 1850, to William M. Lampkin or bearer. The defendant filed three special pleas, each averring, in substance, that he was Cleckley's surety on the note, and that the payee, after the maturity of the note, entered into a contract with Cleckley, without the defendant's knowledge or consent, whereby, for a valuable consideration paid by said Cleckley; said payee extended the time of payment fixed by the note; and he also pleaded usury, and the failure of the plaintiff to sue Cleckley after due notice. On the trial, as the bill of exceptions shows, after the plaintiff had read to the jury the note which was the foundation of the suit, the defendant read in evidence the deposition of said Cleckley, who testified, in substance, that he was the principal in the note, and the defendant was only his surety; that the consideration of the note was, "cotton bought on time," and that he several times procured indulgences on the note, (not stating any particular time,) without the knowledge or consent of the defendant, by paying usurious interest. There was other evidence in the case, but it requires no particular notice.

The court charged the jury, at the instance of the plaintiff—"1. That if they believed, from the evidence, that Lampkin agreed with A. D. Cleckley, the principal in the note, to postpone the day of payment of said note; and that the consideration of said agreement was, usurious interest agreed to be paid by said Cleckley, this was not such an agreement to extend the day of payment as would discharge the surety, and they must find for the plaintiff.

"2. That if they believed, from the evidence, that there was an agreement between Lampkin and Cleckley, the principal, to extend the day of payment of said note after its maturity, and that there was no definite period of extension agreed on, then the surety was not discharged, and they must find for the plaintiff."

The defendant excepted to these charges, and then requested the court to give the following charge: "The

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surety has a right to stand upon the terms of his contract; and if there was an agreement entered into by Lampkin, while he was the owner of the note, with Cleckley, the principal, upon a valuable consideration, either paid, or agreed to be paid by Cleckley to Lampkin, to postpone the day of payment beyond that fixed by the note, (no definite time being agreed upon,) without the defendant's consent, such extension of payment discharged the defendant, and the jury must, in that event, find for the defendant." The court refused this charge, and the defendant excepted to its refusal.

The charges given by the court, and the refusal of the charge asked, are now assigned as error.

WM. P. CHILTON, and GEO. W. GUNN, for appellant.—

1. An extension of the day of payment, by agreement between the creditor and the principal debtor, founded upon valuable consideration, and made without the consent of the surety, discharges the surety from all liability, irrespective of the length of time.—Haden v. Brown, 18 Ala. 641; McKay & McDonald v. Dodge & McKay, 5 Ala. 388; Rathbone v. Rathbone, 10 Johns. 597; King v. Baldwin, 17 Johns. 384; 7 Hill, (N. Y.) 250; 2 Stew. 63; Theobald on Principal and Surety, 118, 123, 181, 184; 32 N. H. 560; 23 Barbour, 478; 6 Indiana, 128; 43 Maine, 381.

2. An extension of the day of payment, in consideration of the payment of usurious interest, discharges the surety.—Kyle v. Bostick, 10 Ala. 589.

CLOPTON & LIGON, *contra*.—1. To discharge the surety by a new contract between the creditor and principal debtor, there must be a valid contract, founded on a valuable consideration, and for a definite period of time.—Freeland v. Compton, 30 Miss. 424; Clark Co. v. Covington, 26 Miss. 470; 8 Texas, 66; 12 Penn. St. R. 383; 13 Ill. 347; 23 Miss. 559.

2. An agreement to pay usurious interest is not a valid contract.—Kyle v. Bostick, 10 Ala. 589; 1 B. Monroe, 322; 31 Miss. 66f.

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R. W. WALKER, J.—[Feb. 1, 1861.]—It is said in many of the cases, that, to discharge a surety by extension of the time of payment, there must not only be a sufficient consideration, but the time of the extension must be definitely and precisely fixed.—Gardner v. Watson, 13 Ill. 847; Parnell v. Price, 8 Rich. L. 121; Wadlington v. Gary, 7 Sm. & M. 522; McGee v. Metcalf, 12 Sm. & M. 535; Freeland v. Compton, 30 Miss. 424; Miller v. Stein, 12 Penn. St. R. 388, 389; Alcock v. Hill, 4 Leigh, 622; 1 Pars. Contr. 173; President of Police Board v. Covington, 26 Miss. 470; Burke v. Cruger, 8 Texas, 66; Thornton v. Dabney, 23 Miss. 559; Miller v. Stern, 2 Barr, 286.

It is undoubtedly true, that a mere indulgence, determinable at the will of the creditor, will not discharge the surety; and it is to indulgences of this character, that the cases just cited must be held to refer.

The principle to be extracted from the authorities is, that where the creditor, upon sufficient consideration, and without the consent of the surety, makes an agreement with the principal debtor, the effect of which is to postpone the period at which the performance might have been compelled in due course of law—in other words, if by a valid agreement, the creditor precludes himself from proceeding against the principal, after the debt is due, according to the terms of the original contract, even for a moment, the surety is discharged. And the true ground on which the surety is relieved in such cases, is the presumptive injury to him, arising from the fact that such an arrangement obstructs his right to pay up the money as soon as it is due, thereby acquiring the power of immediately pursuing the debtor, and that it otherwise impairs the remedies which the surety may find necessary for his protection. If the creditor has tied up his hands, so that he could not himself immediately pursue the debtor, then the surety could not do so, either on paying up the debt, or filing his bill *quia timet*; for he can only be substituted to such rights as the creditor has.—Norris v. Crummey, 2 Rand. 323, 334–38; Hunter v. Jett, 4 Rand.

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104; *Chicester v. Mason*, 7 Leigh, 244, 253; *Bangs v. Strong*, 7 Hill, 250; S. C., 4 Comstock, 315, 325; *Comegys v. Booth*, 8 Stew. 14; *Rathbone v. Warren*, 10 Johns. 587; *Addison Cont.* 70, and cases cited; 2 Am. Lead. Cas. 176; *Draper v. Romeyn*, 18 Barb. 169.

In *Haden v. Brown*, (18 Ala. 641,) it was held, that where there was an agreement, on sufficient consideration, postponing the day of payment of a bill of exchange, although it may not be shown how long, or to what particular time, the payment is agreed to be postponed, the principle above stated applies, and operates the discharge of the surety. In support of this proposition the court said: "It is contended, that the plea, which was demurred to, is insufficient; in as much as it does not show how long, or to what particular time, the payment of the bill was agreed to be postponed. But we think that this objection cannot be sustained. A surety has the right to stand on the precise terms of his contract, and is discharged, if those terms are altered without his consent, whether the alteration consists in the amount of the obligation, or the time or manner of performing it.—*McKay v. Dodge*, 5 Ala. 388; *Bang v. Strong*, 7 Hill, 250. Nor is it material, whether such alteration is prejudicial to the surety or not. The only question is, whether the contract has been changed without his consent; and if it be found that it has been, the surety is discharged; for, never having assented to the new contract introduced by the change, he is not bound thereby. Testing the plea by this rule, we think it is substantially good. It avers, that for a valuable consideration, moving from the drawer of the bill to the plaintiff's testator, who was the holder, the day of payment was postponed. If so, the contract was changed, and the defendant discharged, unless he assented to the alteration. It may be true, that an agreement between the principal debtor and the creditor, which does not stipulate for any precise time, but leaves the legal right in the creditor to sue for, or demand the money due by the contract, at any moment, does not work a change of the contract as to the time of payment. But, when

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the day of payment is postponed by an agreement founded on a sufficient consideration, then it cannot be said that the time of payment has not been altered."

In the present case, the time of payment fixed by the note itself was the 1st day of January, 1851. By the original contract, to which the surety was a party, the creditor might have demanded payment on that day, and, on default of payment, might have brought suit on the note on the next day. On the facts supposed in the charge which the court was asked to give, the creditor, without the consent of the surety, and for a valuable consideration, made an agreement with the principal debtor, whereby the day of payment was postponed beyond the 1st day of January, 1851. For a sufficient consideration, the creditor gave up his right to demand payment on the 1st January, or to institute suit on the 2d. Under his new agreement, he had not the legal right to do either of these things. It matters not that no other day of payment was specifically agreed upon by the parties. By a valid contract, the creditor's hands are tied, for at least one day; and it is sufficient for the discharge of the surety, that the creditor has, by something obligatory, deprived himself, for a single day, of the right of demanding payment and bringing suit. For as, under the supposed contract, the creditor could not have demanded payment on the 1st of January, or commenced suit on the 2d; so, the surety could not, by paying up the debt on the 1st, have acquired the right of immediately pursuing the debtor. If the agreement had been, that the day of payment of the note should be postponed to a time beyond the 8th of January, 1851, it would hardly be contended, that the surety was not discharged, although no other day of payment was specifically fixed upon by the parties. An agreement, which legally prevents the creditor, for a single day, from enforcing collection, has, as to the surety, the same effect as a contract which ties his hands for seven days. In both cases, there is a binding contract, by which the creditor is precluded from suing upon the contract, as soon as he had the right

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to do according to its original terms.—*Draper v. Romeyn*, 18 Barb. 166. The decision in *Haden v. Brown*, *supra*, appears to be precisely in point; and, on the authority of that case, we must hold, that the charge asked should have been given.—See *Dickerson v. Board of Comms.* 6 Indiana, 128, 134; *Fellows v. Prentiss*, 3 Denio, 512, 518, 521; 8 *Leading Cases in Eq.* 561, (3d ed.) and cases cited; *King v. Upton*, 4 Greenl. 387; 2 *Am. Law Reg.* 387.

[2.] Merely giving further time of payment to the principal debtor, without the consent of the surety, does not discharge the latter: time must be given in pursuance of a valid contract for that purpose, which ties the hands of the creditor, so that he cannot sue if he would. The contract for further time is not valid, unless founded upon a sufficient legal consideration. A promise, on the part of the debtor, to pay usury in future, is an engagement which the law pronounces utterly void, and is, consequently, no consideration whatever for a promise by the creditor to give further time of payment. Such a contract for delay, not being binding on the creditor, does not discharge the surety. The first charge given by the court rests upon the hypothesis, that the consideration of the agreement for delay was "usurious interest agreed to be paid by Cleckley"—that is to say, an executory undertaking on the part of the debtor to pay usury thereafter. That such a contract does not discharge the surety, is expressly decided in *Kyle v. Bostick*, 10 Ala. 589; and to the same effect are *Tudor v. Goodloe*, 1 B. Mon. 322; *Pye v. Clark*, 8 *ib.* 262; *Scott v. Hall*, 6 *ib.* 287; *Roberts v. Stewart*, 31 Miss. 664; *Vilas v. Piercy*, 1 Comst. 274, 286; and *Standclift v. Allen*, 14 Ver. 258.

In *Kyle v. Bostick*, (*supra*,) there is a *dictum*, to the effect that, "if the money had been in fact paid by the debtor, instead of a promise to pay it merely, the case would be different."—10 Ala. 595. The distinction here suggested, between an executed and an executory usurious contract—between the payment of usury in advance, and a mere promise to pay it in future—as a foundation

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for a promise on the part of the creditor to give further time, has been recognized and acted upon in several cases decided by the Kentucky court of appeals.—*Kenningham v. Bedford*, 1 B. Mon. 325; *Pyle v. Clark*, 8 *ib.* 262; *Scott v. Hull*, 6 *ib.* 285; *Patton v. Shanklin*, 14 *ib.* 15. See 2 Am. Lead. Cases, 173, 179; *Anderson v. Mannon*, 7 B. Mon. 218; *Duncan v. Reed*, 8 *ib.* 382. While these cases recognize the principle, that a promise to pay usury at a future day, is no consideration for an agreement for an extension of time by the creditor, they hold that, if the usury is actually paid down at the time of the promise to forbear, and as the consideration for such promise, the surety will be discharged. The soundness of this distinction has been denied in New York, and it is there held, that neither the promise to pay, nor the actual payment of usury, is a good consideration for a promise by the creditor to give time; and that a contract for delay, founded on either the one or the other, does not bind the creditor, or discharge the surety.—*Vilas v. Piercy*, 1 Comst. 274, 286-7-9. None of the exceptions taken in this case distinctly present the question here alluded to, and we will not pass upon it at this time.

Judgment reversed, and cause remanded.

SMITH vs. MOORE.

[EQUITABLE ATTACHMENT.]

1. *Bequest to trustee, for comfort and support of debtor, but not liable for his debts, subject to equitable attachment.*—Where a sum of money is bequeathed to a trustee, in trust for a debtor, “not subject to any debt or debts he may have contracted, but for his comfort and support,” it may be subjected by equitable attachment (Code § 2956) to the payment of his existing debts.

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APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Amos Moore, against William G. Smith and Thomas H. Smith; and sought to subject to the payment of a debt, due and owing to the complainant by said William G. Smith, a fund which was in the hands of said Thomas H. Smith, as trustee of said William G., under the following clause in the will of their deceased father, Guy Smith, to-wit: "I further give to my son, Thomas H. Smith, in trust for my son William G. Smith, the further sum of thirty-six hundred dollars, not subject to any debt or debts he may have contracted, but for his comfort and support; and should he depart this life before receiving the same, then, and in that event, the thirty-six hundred dollars to be equally divided with my other children in life; and if any should be dead, their share to their child or children." The testator's will was executed in Georgia, where he resided; and was duly admitted to probate there, after his death, in July, 1857. The complainant's debt against William G. Smith was evidenced by a promissory note, dated the 14th April, 1852, and payable on the 1st November next after date. The fund sought to be reached was paid over to Thomas H. Smith by the administrator in Georgia, and was in his hands at the commencement of the suit. The prayer of the bill was for an equitable attachment, an account, and general relief. A decree *pro confesso* was entered against William G. Smith, on publication duly perfected against him as a non-resident. Thomas H. Smith answered, admitting the material allegations of the bill; but insisting that neither the principal nor the interest of the fund in his hands was liable to the complainant's demand, and demurring to the bill for want of equity. On final hearing, on pleadings and proof, the chancellor held, that the entire fund, both principal and interest, or as much thereof as was necessary, was liable to complainant's debt. He therefore overruled the demurrer, and rendered a de-

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creed for the complainant; and his decree is now assigned as error.

CLOFTON & LIGON, for appellant.—1. If William G. Smith was entitled to the possession of the money, and could sue for and recover the same from the trustee, (as the chancellor held,) then the complainant had a full, complete, and adequate remedy at law, by attachment and garnishment.—Hall v. Magee, 27 Ala. 416; Harrell v. Whitman, 19 Ala. 135. Such a construction, however, would render the trustee a mere conduit, through which the money was to pass from the executor to William G. Smith; and his appointment would be a useless and nugatory act. On the contrary, the interposition of the trustee was necessary, to receive the fund, to apply the income arising from it to the comfort and support of the legatee, and to preserve the fund for the contingent remainder-men; and his title does not cease until these objects are fully accomplished.—Comby v. McMichael, 19 Ala. 747.

2. The broad doctrine was at one time maintained in England, that every right to property, both legal and equitable, must be subject to the incidents of property—alienation, and the payment of debts; and this was put upon the ground, that it was against public policy, and a fraud on creditors, to allow property to be held by a debtor, or in trust for his use and benefit, without being liable to the payment of his debts. But modern decisions in England, and more particularly in America, have greatly restricted and qualified this doctrine; and the principles upon which these latter cases rest, commend themselves by their correct reasoning, and by their enlightened views of public policy. No principle of public policy is contravened, by a father, while living, supporting an indigent or an improvident child; and it is difficult to see what principle forbids that, after his death, his bounty should be expended in the same way, through the agency of an executor or trustee. Creditors have no claim on the father or testator, and their rights are not

prejudiced by his bounty to their debtor: on the contrary, they may be greatly benefited thereby. These views are elaborated, and maintained by unanswerable arguments, in *Hill and Wife v. McKee*, 27 Ala. 182; and in *Braman v. Stiles*, 2 Pick. 463. An examination of the more modern leading cases, both in England and in America, will show, that wherever a right in the property itself, or its proceeds, is vested in the debtor, the same is subject to his debts; but that the words, "support and maintenance," "comfort and support," &c., do not vest such an interest in him as can be reached by his creditors.—*Two-penny v. Peyton*, 10 Sim. 487; *Godden v. Crowhurst*, *ib.* 642; *Stagg v. Beckman*, 2 Edw. Ch. 89; *Ashurst v. Given*, 5 Watts & Serg. 323; *Vaux v. Park*, 7 Watts & Serg. 19; *Fisher v. Taylor*, 2 Rawle, 33; *Norris v. Johnson*, 5 Barr, 289; *Eyrick v. Hetrick*, 13 Penn. 491; *Pope v. Elliott*, 8 B. Mon. 56; 2 Beavan, 63; 18 Vesey, 429; 5 Paige, 583. In this case, besides violating these general principles, the chancellor's decree operates to defeat the rights of the contingent remainder-men.—*Williamson v. Mason*, 23 Ala. 503; *Elmore v. Mustin*, 28 Ala. 313.

N. S. GRAHAM, *contra*, cited *Rugely & Harrison v. Robinson*, 10 Ala. 731; *Robertson & Pettibone v. Johnston*, 36 Ala. 197, and the authorities therein cited.

A. J. WALKER, C. J.—[Jan. 29, 1861.]—It is clear that the testator intended to make the specified fund free from liability to the debts of Wm. G. Smith; and it is almost equally clear, that the law forbids the accomplishment of the purpose. The fund itself, not merely the interest, is devoted to the "comfort and support" of the *cestui que trust*. This is not only the necessary effect of the terms, in which the gift of the fund, in trust for his comfort and support, is made; but it is clearly implied from the making his death, without receiving the fund, the contingency upon which the limitation over depends. The fund is not given to the trustees, to enable them to support the *cestui que trust*: the money itself is given in

trust for Wm. G., for his comfort and support; and he has, undoubtedly, the right to receive for his comfort and support the entire fund, with its accumulations, if necessary. Can it be that a fund, from which one has thus a right to draw for his comfort and support until it is exhausted, is exempt from all liability to his debts?

We shall not deny, that decisions made in Pennsylvania go to the extent of holding property thus situated free from liability to debts.—7 W. & S. 19; *Ashurst v. Given*, 5 W. & S. 323; *Norris v. Johnston*, 5 Barr. 287; *Holdship v. Patterson*, 7 Watts, 547; *Fisher v. Taylor*, 2 Rawle, 33; *Eryck v. Hetrick*, 1 Har. 488. And a case in Kentucky, and another in Massachusetts, go very far in the same direction.—*Pope v. Elliott*, 8 B. Mon. 56; *Braman v. Styles*, 2 Pick. 460. But the Pennsylvania decisions make a palpable innovation upon the law as long established in the English court of chancery, and it is so avowed by the opinion in *Norris v. Johnston*, *supra*.—1 White & Tudor's Leading Cases in Eq. 544; Notes of Hare and Wallace to *Hulme v. Tenant*.

The English doctrine "forbids the disposition of property, divested of its legal incidents" of liability to debts, and susceptibility of alienation.—1 Jar. on Wills, 816; Hill on Trustees, 395. And under the operation of that doctrine, a liability to debts, to the extent of the debtor's interest, has been enforced, in the cases following, to-wit: Where the dividends were directed to be paid into the proper hands of a man, or on his own proper order or receipt, and not to be assignable by way of anticipation, (*Brandon v. Robinson*, 18 Ves. 429;) where an annuity was given in trust for the maintenance and support of the *cestui que trust*, not to be liable to his debts, and to be paid, from time to time, into his proper hands, and not to any other person, (*Graves v. Dolphin*, 1 Sim. 66;) where an annuity was bequeathed in trust, with directions for the payment of dividends for the sole purpose of the maintenance and support of the legatee and his family, and with a prohibition of alienation and liability to debts, (*Yarnold v. Moorhouse*, 1 Russ. & Myl. 364;) where

property was held in trust, to be applied in such manner, and to such persons, for the board, lodging, and subsistence of the donee and his family, as the trustees should think proper, (Rippon v. Norton, 2 Beav. 64;) where there was an assignment to trustees of a fund in trust during the life of H, or such part thereof as they should think proper, and at their will and pleasure, and at such times and in such sums as they should deem expedient, to pay the interest to him, or, at their discretion, to expend the interest in procuring for him diet, lodging, wearing apparel, and other necessaries, so that the same should not be subject to his debts or disposition, (Snowden v. Dales, 6 Sim. 524;) and, lastly, where property was conveyed to trustees, to pay and apply the rents and profits to the support of J, his wife and children, with a prohibition against any charge, or assignment, or anticipation by J.

It is difficult to reconcile the two cases of Twopenny v. Peyton, (10 Sim. 487,) and Godden v. Crowhurst, (ib. 642,) with the other English decisions, or with the proposition, that the *cestui que trust* in this case has an interest liable to his debts. We refer to the discussion of those two cases by Judges Ormond and Goldthwaite, in *Rugely & Harrison v. Robinson*, (10 Ala. 702,) where an attempt has been made to place them in harmony with the other decisions.—See, also, *Hill on Trustees*, 396, note x. In *Younghusband v. Gisborne*, (1 Col. 400,) there was a trust for the personal support, clothing, and maintenance, with a provision that the fund should not be subject to the debts of the *cestui que trust*. The fund was held subject to pass to the assignees under the insolvent debtors' act; and the vice-chancellor, in commenting upon the cases of Twopenny v. Peyton and Godden v. Crowhurst, said, that if they were not distinguishable from the case before him, he "must respectfully dissent from them." So, too, we say, that if they are not distinguishable from this case, they are at war with all the other English decisions, and with a principle well established in the English law, and we must respectfully dissent from them. The au-

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thorities, which we have collated, most conclusively show, that the established doctrine in the English chancery does not permit any other conclusion, than that the fund in the hands of Thomas H. Smith is liable to the debts of Wm. G. Smith.

The decision in *Hill and Wife v. McRae*, (21 Ala. 175,) when considered in its entirety, and not in reference to any single sentence, does not support the position, that in this case the trust fund enjoys any immunity from liability to debts. It is in reference to a bequest of property to be held in trust for the support of a man and his wife and children; and the decision is placed upon the ground, that the interest of the debtor was so blended with that of the wife and children, that the former could not be separated and subjected to debts without detriment to the latter. And the same doctrine seems to have been recognized in the opinions in *Rugely & Harrison v. Robinson*, 10 Ala. 702. See, also, *Fellows, Wadsworth & Co. v. Tann*, 9 Ala. 999; *Spear v. Walkley*, 10 Ala. 323.

The precise question of this case seems to have been involved in the case of *Clark v. Windham*, (12 Ala. 798;) and it is not a strained inference, that an adjudication of it adversely to the appellants is implied in that decision. In the case of *Robertson & Pettibone v. Johnston*, (36 Ala. 197,) we endorsed the doctrine declared by Judge Ormond in *Rugely & Harrison v. Robinson*—"that a beneficial interest cannot be given to one, so that it cannot be reached by his creditors, unless such interest is conferred, and is to be enjoyed jointly with others, and is also incapable of severance." We but carry out that doctrine, and follow the lead of our former decisions, in declaring that the fund held in trust for William G. Smith is liable to his debts.

We think Wm. G. Smith's right to the fund was equitable, and was liable to attachment in equity under section 2956 of the Code.—*You v. Flinn*, 34 Ala. 409.

Affirmed.

WEBB vs. KELLY.

[DETINUE FOR SLAVE.]

1. *General objection to evidence.*—A general objection to evidence, a part of which is legal, may be overruled entirely.
2. *Admissibility of declarations as part of res gesta.*—The declarations of the vendor of a slave, made "a few days after the sale," to the effect that, if he had known that the slave was not going to Texas, (whither the purchaser had represented that he intended to carry him,) he would not have sold him, are not evidence for the declarant, as a part of the *res gesta*, in a suit involving the validity of the sale.
3. *Admissibility of record as evidence in another suit.*—In detinue for a slave, brought by the vendor against the purchaser,—the material inquiry being, whether the purchase-money was furnished by the defendant, or by the slave himself; and the defendant, for the purpose of showing that the plaintiff, before the sale, "knew that the slave had money, and permitted him to have, use and dispose of it as he pleased," having read in evidence a receipt, by which the plaintiff acknowledged to have received a sum of money, for safe-keeping, from the slave and his mother,—the record of a suit instituted by the defendant, after the sale, in the name of the owner of the slave's mother, (but without his authority or knowledge, and afterwards discontinued by him,) for the recovery of this money from the plaintiff, is not competent evidence for the plaintiff; "to explain said receipt, and to show that the defendant regarded the money as belonging to the slave's mother."
4. *Personal attendance of witness, and suppression of deposition.*—*Scilicet*, that the act "to compel the personal attendance of witnesses in civil cases," (Session Acts 1857-8, p. 34,) does not apply to a witness, who is confined in jail under a judicial sentence; but, if the proper affidavit has been made, and the attendance of the witness can be procured, the deposition ought to be suppressed.
5. *Release of surety on detinue bond, and examination as witness.*—The surety on a detinue bond may be released; and examined as a witness for his principal, on the execution by the latter of a new bond, with other good and sufficient sureties; but it is not permissible to erase the surety's name from the bond, against the objection of the obligee, and substitute the name of another surety in his stead.
6. *Master's right to money acquired by slave; validity of contract for benefit of slave.*—If the master knowingly permits his slave to ac-

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quire money, and to pay it out to a third person, in a fair business transaction, he cannot afterwards reclaim it; but, if such third person receives and holds the money for the benefit of the slave, and as his bailee, and it is afterwards used, without the knowledge of the master, in purchasing the slave for himself from the master, the contract is void, and does not divest the title of the master.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by James Kelly, against John T. Webb, to recover a slave named Wash, under the following circumstances: The slave belonged to the plaintiff, and was employed by him as a cab-driver in the city of Mobile, but was permitted to retain for himself about one-half of his wages. The defendant procured one Williams to negotiate with plaintiff for the sale of the slave; the plaintiff sold him to Williams, on the 16th July, 1857, for one thousand dollars, and executed to Williams a bill of sale, with warranty of title and soundness; and, on the next day, Williams executed a similar bill of sale to A. Brooks, who then paid over the purchase-money to the plaintiff. A part of the purchase-money was paid by the draft of one Landermilk for \$500, which he had given to the slave for borrowed money; and the defendant's evidence tended to show that he had himself furnished a portion of the residue. The plaintiff contended, that the purchase by Williams was made, at the instigation of the defendant, under an agreement between him and the slave, that the purchase should enure to the benefit of the slave, and that the money was in fact furnished by the slave. Williams testified, that he had no interest whatever in the slave, and that he made the purchase for, and at the instance of the defendant. Brooks testified, "that he never had or claimed any title to the slave, and never paid any of his own money for him; but that the title was made to him to oblige the defendant, who did not want to be known in the transaction, and who brought the money to him." During the negotiations between the plaintiff and Williams, the

latter represented, "that he lived in Texas, where the slave had relatives, and intended to leave for Texas, with the slave, as soon as the purchase was concluded." A witness for the plaintiff stated, "that he heard plaintiff say, a few days after the sale, that he would not have sold Wash, if he had known that he was not going to Texas, where he had kin." The court admitted this statement as evidence, as a part of the *res gestæ*, against the defendant's objection; to which the defendant reserved an exception.

Before the trial commenced, the defendant moved the court to suppress the deposition of one Mary Labonte, which had been taken on direct interrogatories and cross-interrogatories while the witness was in jail under a judicial sentence, and stated to the court, "that he had made the statutory affidavit to procure the personal attendance of said witness, (Acts 1867-8, p. 64,) and that she was then present in the court-house, under the order of the court." The court refused to suppress the deposition, "on the ground that the statute did not apply to witnesses who were in jail, under judicial sentence, for an offense against the criminal law;" but gave leave to the defendant to put the witness on the stand as his own witness, if he desired to do so. The defendant declined to introduce the witness as his own, and reserved an exception to the overruling of his motion to suppress the deposition. During the trial, when the deposition of this witness was offered in evidence to the jury, the defendant moved the court to suppress the answer to the fourth interrogatory, which was in these words; "Wash pretended to be lame, in order that he might induce Mr. Kelly to sell him. I have heard him say that this was his object. It was a mere pretense: he was not lame. When he saw Mr. Kelly or his friends, he would make out that he was lame. In the house, whenever I saw him, he walked straight. He often talked of how he was trying to fool Mr. Kelly." No ground of objection to this answer was specified. The court refused to exclude it, and the defendant excepted.

The defendant had proved, that the plaintiff, prior to the sale to Williams, permitted the slave to retain a great part of his earnings, to employ counsel to defend himself, when prosecuted for an infraction of the city laws, &c.; and, "for the purpose of showing that the plaintiff knew, before said sale, that the slave had money, and permitted him to have, use and dispose of it as he pleased," had read in evidence a receipt, signed by plaintiff, in these words: "Received from Boy Wash and his mother, Clarissa, four hundred dollars, for safe-keeping;" on which were endorsed these words: "Paid on the within, two hundred dollars." "To explain said receipt, and to show that the defendant regarded the money as belonging to said Clarissa," the plaintiff offered in evidence the record of a suit, instituted against him, after the sale, in the name of one Wiloy, (who was the owner of Clarissa,) for the recovery of the money specified in the receipt; accompanied with the parol testimony of said Wiloy, to the effect that said suit was instituted by the defendant, without his authority or knowledge, and was dismissed by him, at the defendant's cost, before trial. The defendant objected to the admission of this record as evidence, on the ground that it was irrelevant; the court overruled his objection, and he excepted.

On the institution of the suit, the defendant having failed to give the statutory bond for the forthcoming of the slave, the plaintiff gave bond; with W. O. Wright and T. H. Robinson as his sureties; and the possession of the slave was delivered to him by the sheriff. During the trial, the court allowed the plaintiff, against the defendant's objection, to erase the name of Robinson from the bond, and to substitute the name of one Masterson in its stead, in order that he might examine Robinson as a witness; to which action of the court the defendant reserved an exception.

The defendant requested the court to instruct the jury, that if they believed, from the evidence, that the plaintiff permitted the slave Wash to retain a part of his earnings for himself, and to use and dispose of the money he

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was thus permitted to acquire as he pleased; and that Wash, in the absence of a revocation of this consent, afterwards loaned the money thus acquired to Lander-milk, and it was used by Williams in the purchase of Wash, then the plaintiff would have no right to reclaim the money so acquired, used, and disposed of by Wash." The court refused to give this charge, and the defendant excepted to its refusal.

All the rulings of the court to which, as above stated, exceptions were reserved, are now assigned as error.

SMITH & CHANDLER, for appellant.—1. The deposition of the witness Lebonte ought to have been suppressed, and the witness examined personally on the stand. The general policy of the law requires, that witnesses should be examined orally, in open court, whenever it can be done. The act of 1858 is very comprehensive in its language, and does not exempt from its operation witnesses who are confined in jail; nor does any reason, or principle of public policy, demand that they should be excepted. Even if the act did not apply, it was the duty of the court to suppress the deposition, when it was made to appear that the witness was in fact present in court.

2. The answer of this witness to the fourth interrogatory, consisting of the declarations of the slave, was not competent evidence against the defendant.—*Mauldin & Terrell v. Mitchell*, 14 Ala. 814.

3. The declarations of the plaintiff, made several days after the sale, constituted no part of the *res gestæ*, and were not made in the presence of either Williams or the defendant. A party cannot be permitted thus to manufacture evidence for himself.—*Hooper v. Edwards*, 20 Ala. 520; 6 Ala. 765; 3 Conn. 250; 2 J. J. Mar. 380; 15 Barb. 530.

4. The court erred in permitting the plaintiff to erase the name of Robinson from the bond, and to substitute the name of Masterson in its stead. This effected a material alteration of the bond, which rendered it void as to the other surety; and the rights of the obligee cannot be

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thus impaired or destroyed, against his consent. A new bond ought to have been executed and tendered.

5. The record of the suit of Wiley against Kelly was not relevant to any issue in the case; while it contained evidence which was calculated to injure the defendant before the jury.

6. The charge asked and refused, ought to have been given. It was proved, that plaintiff permitted the slave to retain and dispose of a part of his earnings as he pleased, knew that he had money, and authorized Lander milk to borrow money from him; and that the money so borrowed by Lander milk was used in the purchase by Williams. On these facts, he had no right to reclaim the money.—*Shanklin v. Johnson*, 9 Ala. 270; *Jones v. Nirdlinger*, 20 Ala. 490; 38 Ala. 520. If he had the right, at his election, to rescind the contract, and recover the slave, he ought first to have returned the money advanced by the defendant.—13 Barbour, 645; 2 Hill, 388; 1 Denis, 74; 1 Metcalf, 550.

F. S. BLOUNT, and G. Y. OVERALL, *contra*.—1. The act of 1868, to compel the personal attendance of witnesses, has no application to persons who are in jail under sentence of the law; nor had the defendant complied with its requisitions, to procure the attendance of the witness. If he was injured by the refusal of the court to suppress the deposition, he might have examined the witness orally, as the court gave him permission to do.

2. The answer of the witness Lebonte to the fourth interrogatory contained some legal evidence, while the objection to it was general.—*Bigelow v. Ward*, 29 Ala. 471; *Shepherd's Digest*, 506, and authorities there cited.

3. The declarations of the plaintiff were admissible, as a part of the *res gestæ*; and even if there was error in their admission, the error worked no injury, since the evidence could not have affected the issue before the jury.

4. The plaintiff had a right to examine Robinson as a witness, and to substitute a new surety in his stead.—

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5 Sm. & Mar. 283; 3 Cowen, 251; 3 Wendell, 276; 3 Jobria, 203.

5. It was certainly competent for the plaintiff to explain the receipt which the defendant had read in evidence, and to show that the defendant himself had treated the money, therein mentioned, as belonging to Clarissa; and the record was admissible evidence for that purpose.

6. If the money paid by Branks to Kelly, or any part of it, was furnished by the slave, and that fact was not known at the time by Kelly, the sale was a nullity, and Kelly's title to the slave was never divested. So long as the money remained in the possession of the slave, or was held in trust for him, the master had a right to reclaim it. 9 Ala. 271; 20 Ala. 490; 28 Ala. 514. The sale was void, for fraud, and for want of consideration.—15 Mass. 156; 10 N. H. 477; 14 Barbour, 594; Cro. Eliz. 199; 1 Bing. N. C. 534; 6 N. H. 225; Chitty on Contracts, 589.

STONE, J.—[Feb. 26, 1861.]—In the answer of the witness Mary Lebonte to the 4th interrogatory, are some statements of fact, which are clearly legal evidence. The objection of the appellant was general, to the whole answer. Under these circumstances, the court did not err in overruling the objection.—Shep. Dig. 596, § 169.

[2.] In admitting, as evidence, for plaintiff, what he had himself said a few days after the sale, the city court erred. This was no part of the *res gesta*, and Mr. Kelly could not make evidence for himself.—Shep. Dig. 592; Newcombe v. Leavitt, 22 Ala. 631.

[3.] We do not know any principle on which the record of the suit between Wiley and Kelly could be evidence for any legitimate purpose in this trial. It was irrelevant, and could not possibly shed any light on the main subject of contest, namely, whose money was used in the purchase of the slave Wash? The court erred in admitting the record.

[4.] The question of the duty of the city court to suppress the deposition of the witness Mary Lebonte, and to bring her personally before the court, will probably not

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again arise in its present form. It is probably true, that a witness, confined in prison under sentence of the law, is not within the spirit of the statute; but when the proper affidavit is made, and the attendance of the witness can be procured, the deposition should be suppressed.—Acts 1867-8, p. 34

[5.] In the form in which the attempt was made to render Mr. Robinson a competent witness for Mr. Kelly, the city court also erred. It was not permissible to erase Mr. Robinson's name from the bond, and supply his place with another surety. A new and sufficient bond should have been executed and approved, before any action of the court should have been had, exonerating Robinson as a surety. Tendering such good and sufficient surety, and executing a proper bond, Mr. Kelly had the right to ask that his former surety be discharged, that he might testify as a witness for him.—Taylor v. Branch Bank at Huntsville, 14 Ala. 633; Drinkwater v. Holliday, 11 Ala. 134.

[6.] We think the charge asked and refused, misapprehends the rights of the parties to this suit. The gist of Mr. Kelly's complaint lies in the claim by him, that the pretended purchase of Wash, by Mr. Williams and Mr. Webb, was with money to which neither of them had any claim, but which belonged to him, Kelly; that a fraud was practiced upon him, and his title to his property sought to be divested, by a pretended purchase by Williams, when in fact the purchase was made by the slave Wash himself, with the money of his master.

The rule is well settled in this State, that a slave can not be the owner of property, but whatever accrues to the slave, becomes the property of his master.—See Brandon v. Bank of Huntsville, 1 Stew. 320; Jones v. Nirdlinger, 20 Ala. 488. If the slave acquire money or property with his master's consent, and with like permission pay it out to another, who receives it fairly and in a business transaction, the owner of the slave cannot afterwards pursue such money and recover it.—Shanklin v. Johnson, 9 Alabama, 271; Stanley v. Nelson, 29 Ala.

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514. But, to come within this rule, the person who receives the money or property from the slave, must receive it in his own right; and not as a bailee or custodian for the benefit of the slave. If the money or other thing be received and held for the slave, it is still subject to the master's assertion of ownership.

The fact that Wash "loaned the money thus acquired to Landermill, and it [the money] was used by Williams in the purchase of Wash," did not, without more, destroy Mr. Kelly's right to the money. It would still be subject to his assertion of ownership, so long, as it was held for Wash's benefit; and if the purchase was in fact made with money furnished by the slave, without the knowledge of Mr. Kelly; and this change of title was procured to be made to Williams, but, in reality, was for the benefit of the slave himself,—then, on the ascertainment of these facts by the jury, Mr. Kelly would have the right to retake the possession of his slave.

Reversed and remanded.

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[DEFENSE FOR SLAVES.]

1. *Charges given on request must be taken by jury on retirement.*—When charges to the jury, in writing, are given by the court at the request of a party, it is the duty of the court to allow the jury to take such charges with them on their retirement, and the refusal to do so is error: the statute (Code, § 2254) is mandatory, and not simply directory.
2. *Estoppel by bond, and ex pais.*—A delivery bond, executed by the defendant in detinue, which does not recite any fact showing that the defendant had possession of the property at the service of the writ, does not estop him from showing, in defense of the action, that he did not have the possession of the property at that time; nor does the giving of such bond operate as estoppel ex pais.

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against him. — (Explaining and limiting *Wells v. Long*, 16 Ala. 428.)
 2. Admissibility of parol to every date of deed. — Parol evidence is admissible, to show that a deed or bond was in fact executed on a different day from that stated in it.

APPEAL from the Circuit Court of Walker.

Tried before the Hon. A. A. COLEMAN.

THIS action was brought by J. W. Hampton, as the administrator of Martha Miller, deceased, against Lucius C. Miller and Matthew R. Miller, to recover several slaves; and was commenced on the 12th March, 1859. The writ was executed by the sheriff, on the day of its date, on both of the defendants, who, on the same day, executed a delivery bond for the forthcoming of the slaves, which was approved by the sheriff on the 14th March, and the condition of which was in the following words: "Whereas the above-named J. W. Hampton did, on the 12th March, 1859, obtain from the office of the circuit court of Walker county a writ or summons against the said L. C. Miller and M. R. Miller, returnable to the spring term of the circuit court of said county; and whereas the sheriff of said county was, by said writ, commanded to seize and take in possession the following slaves," (naming them;) "by virtue of which summons, H. G. Lollar, sheriff, did take possession of the above-named slaves: now, if the above-bound L. C. and M. R. Miller shall well and truly deliver the above-mentioned slaves to the said J. W. Hampton, administrator as aforesaid, within thirty days after judgment, in case the said Millers fail in the suit, and pay all damages of said property and costs, then the foregoing obligation to be void," &c. The defendants pleaded, "in short by consent," *non est*, and the statute of limitations of six years.

On the trial, as the bill of exceptions shows, after the plaintiff had read in evidence the delivery bond executed by the defendants, "the defendants offered evidence showing, that said Matthew R. Miller did not have possession of any of said slaves at the commencement of this suit, and that no demand had been made of him for said

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slaves before the bringing of this suit; and, in connection with this evidence, offered to prove that the name of said Matthew R. Miller, as one of the makers of said delivery bond, was not signed by him. This testimony was offered, as stated at the time, to contradict the recitals of said bond as to possession; the said defendant admitting the bond to be his bond and genuine." The court excluded the evidence, and the defendants excepted.

The court charged the jury, "that the delivery bond given in this case estopped both of the defendants from denying that they had possession of the slaves sued for at the service of the writ;" to which charge the defendants excepted." "The defendants asked the court to give several charges, which were in writing, and which the court gave as asked. The defendants then asked the court to permit the jury to take said charges, as given by the court, with them on their retirement to consider of their verdict; but the court refused to do so; to which refusal the defendants excepted."

The several rulings of the court to which exceptions were reserved, are now assigned as error.

THOS. M. PETERS, for appellant.—1. The delivery bond did not estop the defendants from showing that Matthew R. Miller was not in possession of the property at the service of the writ. It contains no recital of possession by them, or of facts from which such possession can be implied; and its mere execution cannot operate as an estoppel *en pais*, since the plaintiff's conduct could not have been in any manner influenced by it. It was simply intended to secure the delivery of the property to the plaintiff, and the payment of the costs and damages, in the event he succeeded in the suit; and it cannot be extended by construction to purposes not contemplated by the parties.—Code, §§ 2182-98; 1 Greenl. Ev. §§ 22-27; 1 Phil. Ev. (C. & H.) 366, 368, and notes; *McCravey v. Remson*, 19 Ala. 486; *Pounds v. Richards*, 21 Ala. 421; *Stone v. Britton*, 22 Ala. 548; *Crutchfield v. Hudson*, 23 Ala. 398; *Ware v. Cowles*, 24 Ala. 446; 14 Ala. 371;

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27 Ala. 651; 29 Ala. 233; Giles v. Pratt, 2 Hill, (So. Ca.) 439; 1 Car. & P. 22; 2 M. & R. 481; 11 Shep. 832; 7 Conn. 214; 4 Mass. 180, 278; 2 Pick. 425; 9 Pick. 520; 1 Rawle, 141; 2 John. 382; 3 Rand. 563; 8 W. & S. 125; 31 Ala. 532, 575; 7 Barr, 185; 8 Wendell, 488; 9 B. & C. 586; 5 N. H. 453.

2. The jury ought to have been permitted to take with them, on their retirement, the written charges which had been given at the instance of the defendants. This was not a matter of discretion with the court, but a right secured to the defendants by statute. The statute is mandatory, and not directory merely; and it ought to receive such a construction as will effectuate the purposes intended by it.—Code, § 2355; *Ex parte Banks*, 28 Ala. 28, and cases there cited; 1 Bouv. Dic. 473; 4 S. & R. 265; 3 Burr. 2539.

JENN T. MOREAN, *contra*.—1. As to the conclusiveness of the delivery bond, see *Wallis v. Long*, 16 Ala. 738.

2. That the word *may*, as used in section 2355 of the Code, is directory merely, see *Ex parte Simonton*, 9 Porter, 395; *Walker v. Chapman*, 22 Ala. 116; 17 Ala. 440; 2 Ala. 305; 3 Humph. 157.

R. W. WALKER, J.—[Jan. 30, 1861.].—1. The Code provides, that “charges moved for by either party, must be in writing, and must be given or refused in the terms in which they are written; and it is the duty of the judge to write ‘given’ or ‘refused,’ as the case may be, on the document, and sign his name thereto; which thereby becomes a part of the record, and may be taken by the jury with them on their retirement.”—Code, § 2355. Under this law, when a party asks a proper charge, he has the right to have it given in the terms in which it is asked; and, in order that he may have the full benefit of it before the jury, he may demand that it shall be taken with them, so as to be subject to their examination, on their retirement. One of the purposes of the law is, that there shall be no misunderstanding, on the part of the

jury, as to the written charges given or refused by the court; and this end is much more surely attained by having the charges before the jury during their deliberations, than when they are simply read to them by the court, and then withheld from their inspection. When written charges are asked, and either given or refused, the law makes them a part of the record—as much so as the depositions, or other documentary evidence read on the trial; and both alike should be subject to the inspection of the jury during their retirement. Where numerous charges in writing are asked by counsel, some of which are given, and some refused, it might often happen, if the charges were withheld from the jury, that they would fail to recollect the substance of the charges given, or even confound those which had been given with those which were refused; and in this way serious injury might result to one of the parties. In cases such as those we have supposed, it would be as reasonable to compel the jury to depend upon their memory as to the contents of the documentary evidence introduced on the trial, as to deny them the possession of the written charges upon the law of the case given by the court. It follows, that the court erred, in refusing to permit the jury to take with them, on their retirement, the written charges which had been given at the instance of the defendant.—See *Polly v. McCall*, at June term, 1860.

2. The only other question, which we deem it necessary to notice, is that which is presented by the several charges of the court, to the effect that the delivery bond estopped both the defendants from denying that they had possession of the slaves at the time of the service of the writ.

"The law of estoppel is not so unjust and absurd, as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement, by and under his hand and seal, as to certain facts, he shall not be permitted to deny any matter which he has so asserted."—*Per Taunton, J.*, in *Bowman v. Taylor*, 2 Ad. & Ell. 278. The doctrine of estoppel has, however, been guarded with great strictness; not because

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the party enforcing it necessarily wishes to exclude the truth, for it is rather to be supposed that that is true which the opposite party has already solemnly recited; but because the estoppel may exclude the truth. Hence, estoppels must be "certain to every intent, and are not to be taken by argument or inference;" for no one shall be denied setting up the truth, unless it is in plain contradiction to his former allegations and acts.—Co. Litt. 352 (b); 1 Greenl. Ev. § 22; *Bowman v. Taylor*, 2 Ad. & Ell. 278-9.

The delivery bond, executed by the defendants, is set out in the record. The condition, after reciting the issuance of the summons against the defendants, and that the sheriff was commanded thereby to seize and take in possession certain slaves, states that, by virtue of said summons, the sheriff "did take possession of said slaves." It then proceeds—"now, if the above-bound L. C. and M. R. Miller shall well and truly deliver the above-mentioned slaves to the said J. W. Hampton, administrator as aforesaid, within thirty days after judgment, in case the said Millers fail in the suit, and pay all damages of said property, and costs, then the foregoing obligation to be void; otherwise, to remain in full force and effect." There is no express acknowledgment in the bond that the defendants, or either of them, had possession of the slaves at the time of the service of the writ, or the commencement of the suit; nor is their possession a necessary implication from any fact recited in the bond, or from the act of the defendants in executing it. The purpose of the bond was not to admit the possession of the slaves by the defendants, but merely to secure the delivery of the property, and the payment of the costs and damages to the plaintiff, in case he should succeed in the action. The bond might have been given in the terms in which it was executed, whether the defendants had possession or not, or where only one of them had possession. As a general rule, where, at the commencement of the suit, a slave is in the possession of the defendant's bailee for hire, for an unexpired specific period, the defendant cannot be held

liable in detinue. If, in such a case, the sheriff was directed to take possession of the slave, the bailor might certainly give a delivery bond in the terms of the one set out in this record, without being thereby estopped from showing in his defense on the trial, that he was not in possession of the property at the service of the summons. The only facts distinctly recited are, that the plaintiff had obtained a writ or summons against the defendants; that by said writ the sheriff was commanded to seize and take in possession certain slaves, and that by virtue thereof the sheriff did take possession of said slaves. There is no estoppel by deed, unless the matter is distinctly alleged, and with certainty to every intent. Such an estoppel cannot be extended by intendment or implication to matters which are not clearly within its terms. *Naglee v. Ingersoll*, 7 Barr, 185, 199; *McComb v. Gilkey*, 29 Miss. 146, 190; *Campbell v. Knight*, 11 Shepley, 882; 2 Smith's Lead. Cas. 688; 2 Parsons Contr. 340 (c), and notes. As the recitals of this bond do not admit possession, and as the making of such admission was not the purpose to be effected by the execution of the bond, it cannot operate as a technical estoppel by deed.

Nor can the act of the defendants in executing the bond constitute an estoppel *en pais*. In order to raise an act or admission of a party from the rank of evidence to the dignity of an estoppel, it must be plainly inconsistent with the evidence which is proposed to be given, and it must have so influenced the conduct of the party by whom it is sought to be used as an estoppel, that he would be injured by allowing evidence to be introduced inconsistent with it.—*Ware v. Cowles*, 24 Ala. 449; *Carter v. Darby*, 15 Ala. 698; *Hunley v. Hunley*, 15 Ala. 91; *Comm. v. Moltz*, 10 Barr, 527; *Dazell v. Odell*, 3 Hill, 219; 2 Smith's Lead. C. (5th Am. ed.) 642-7; 2 Parsons Contr. (4th ed.) 340-1. These requisites of an estoppel *en pais* are wanting here. In the first place, the act of giving the delivery bond is not plainly inconsistent with the fact which the excluded evidence tended to prove—namely, that the slaves were not in the possession of both of the

defendants. For the bond might well have been executed by both defendants, although the property was in fact in the sole possession of one of them; or, as we have before suggested, the bond might have been executed by both defendants, although the property was in the possession of neither, but in that of their bailee for hire. If the act or admission is susceptible of two constructions, one of which is consistent with the fact sought to be proved, the party would not be concluded from establishing it; because to do so might operate to defeat a man's rights by argument or inference, which is not allowable.—*Ware v. Cowles*, 24 Ala. 449. In like manner, it cannot be pretended that the act of the defendants has in any manner influenced the conduct of the plaintiff. It is not shown that he has taken any step in consequence of the execution of the bond, which he would not have taken if the bond had not been given. The summons had been issued, and the property seized under it, before the bond was executed. The issuance of the summons, and the seizure of the property, were the cause, not the consequence of the execution of the bond. As it does not appear that the act of the defendants in giving the bond has induced the plaintiff to alter his condition, or change his course of action, he cannot set it up as an estoppel *en pais*. Authorities *supra*; *Copeland v. Copeland*, 28 Me. 525; *Steele v. Putney*, 15 Me. 327; *Heane v. Rogers*, 9 B. & C. 577; *Farrell v. Higley, Hill & Denio*, 87; *Wallis v. Truesdell*, 6 Pick. 455; *Jackson v. Pixley*, 9 Cush. 490; *Decherd v. Blanton*, 3 Sneed, 373.

We do not say that the execution of the bond does not tend to show possession by the defendants, but simply that it does not conclude them, and preclude all proof to the contrary.

In *Wallis v. Long*, (16 Ala. 738,) it was said, that the delivery bond executed by the defendant in that case, which was an action of detinue, "was an admission that he was in possession at the time the writ was executed, and estopped him from denying that fact; but that, as no admission or recital was contained in it, showing posses-

sion anterior to that time, it did not preclude the defendant from showing that at the date of the writ he had not the possession." If the bond in this case did not differ in its terms from the one referred to in the case just cited, that decision would be in conflict with the views we have expressed. The bond is not set out in the report of the case; but we have examined the original record, and find that it contains what must be regarded as a distinct admission that the defendant was in possession when the writ was executed. After reciting the issuance of the writ in detinue in favor of the plaintiff against the defendant, and that by virtue of it the sheriff had taken possession of the slave sued for, the bond proceeds thus: "And whereas the said Jeremiah Long is desirous of retaining the possession of said slave, under the hiring which he made of Wm. Easley, administrator of John Lemmons, deceased," &c. The difference between the bond which was given in that case, and the one now before us, is too apparent to require remark; and the opinion of the court, giving to that bond the effect of an estoppel upon the question of possession, is in entire harmony with our present decision.

[3.] We suppose that one of the exceptions was intended to present the question, as to the right of the defendants to show that the bond was not executed on the day on which it bears date; but the exception is not so stated as to raise that question. It is very clear, however, that it is competent to show that a deed or bond was executed on a different date from that stated in it.—*McComb v. Gilkey*, 29 Miss. R. 146, 190.

Judgment reversed, and cause remanded.

McALLISTER'S EXECUTOR vs. McALLISTER.

[BILL IN EQUITY BY WIDOW, AFTER ALLOTMENT OF DOWER, FOR RECOVERY OF RENTS, OR MENSE PROFITS.]

1. *Extent of widow's quarantine.*—A plantation, about five miles distant from the town in which the husband resided at the time of his death, from which he drew his supplies and derived his entire income, and the superintendence of which constituted his only business, is not so connected with his residence, (Code, § 1359,) as to entitle the widow to the possession or rents thereof until her dower is assigned. (A. J. WALKER, C. J., dissenting.)
2. *Jurisdiction of equity to award mesne profits, and measure thereof.*—After dower has been allotted to the widow by the probate court, she may come into equity to recover damages for its detention; and the measure of her damages, where the husband left no descendants, would be one-half of the rent, from the death of her husband, until the assignment of dower.
3. *Equitable set-off against claim for mesne profits.*—If the executor carries on the plantation of the deceased husband, with the labor of the slaves, pays all the debts and expenses of administration out of the income, thereby saving the entire personal estate for distribution, and distributes to the widow, under an order of the probate court, her distributive share of the residue of such income, this constitutes no defense to the widow's claim for mesne profits; yet, if he acted in good faith, he is entitled to a credit out of the assets for the amount of damages recovered from him by her; and if the amount received by her as a distributee exceeds her proper share, to be ascertained after deducting the amount of her recovery from the entire fund for distribution, he may, under appropriate pleadings, recover the balance from her, and have it adjusted in the suit for mesne profits.

APPEAL from the Chancery Court of Marengo.

Heard before the Hon. WADE KEYES.

THE bill in this case was filed by Mrs. Agnes McAllister; the widow of William McAllister, deceased, against the executor of said decedent, to recover the rents of the plantation belonging to the decedent, from the time of his death until her dower was assigned to her under an

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order of the probate court. The decedent died in October, 1853, leaving no children or their descendants; having executed and published his last will and testament, which was duly admitted to probate after his death, and of which Lewis B. McCarty, the defendant, was appointed the executor; and being seized and possessed of a house and lot in the town of Demopolis, in which he resided at the time of his death, and a plantation about five miles distant in the country, which contained about eight hundred acres. The widow dissented from the will, within the time prescribed by the statute, and afterwards instituted proceedings in the probate court for an allotment of her dower; and her dower was allotted to her, by commissioners appointed by said probate court, on the 14th January, 1856. The bill alleged, that the decedent "resided on and cultivated said plantation, from the year 1826, until January, 1851, when he removed to the town of Demopolis, (about five miles distant therefrom,) for the sake of comfort and society, and for no other purpose; that he continued the cultivation of said plantation as before, was engaged in no other business than that of planting, derived all his income from said plantation to the time of his death, and all the supplies for the support and consumption of his family, except sugar, coffee, and similar articles of foreign export, as well after as before his said removal to Demopolis; that said plantation was in fact, at the time of his death, but an appurtenance to his residence in the town of Demopolis, and connected therewith;" and that said executor had been in the possession of said plantation, and in receipt of the rents and profits thereof, from the time of his appointment and qualification. The complainant claimed that she was "entitled to the rents of said entire plantation, from and after her husband's death until dower was assigned her, under and by virtue of her right to the possession thereof until the assignment of her dower, together with interest on said rents;" and added the general prayer, for other and further relief.

The executor filed an answer to the bill; denying that

the plantation was appurtenant to the decedent's residence, or connected therewith, or that the complainant was entitled to any portion of the rents; but admitting all the other allegations of the bill. He alleged, also, by way of defense, that with the proceeds of the crops raised on the plantation he had paid all the debts of the estate, with the expenses of administration, and, under an order of the probate court, had distributed one-half the residue to the complainant, as a part of her distributive share of the personalty; and he insisted, that she was thereby estopped from asserting any claim to the rents.

By agreement between the parties, it was admitted, "that the decedent drew all of his supplies from said plantation during his life-time, and owed money and large debts at the time of his death; that the defendant, as executor, had cultivated four hundred and thirty-five acres of said plantation, from 21st August, 1854, until the 14th December, 1856, when the complainant's dower was assigned to her; that said land was worth, by way of rent, \$2 50 per acre; that the crops raised on said land by said defendant, during the time aforesaid, were sold by him for \$5,101 58, of which amount \$3,553 48 was applied by him to the payment of debts, being all the debts of the estate; that the complainant dissented from the will, and took one-half of the property after the payment of debts; that a balance of \$1,875 66, after payment of debts, was left in said defendant's hands, arising from the proceeds of said crops, as ascertained by a decree of the probate court of said county, on a settlement had before the institution of this suit; and that one-half of this amount, \$937 88, was decreed to complainant on said settlement, and paid to her by said defendant."

On final hearing, on bill, answer, and admitted facts, the chancellor held the complainant entitled to the entire rents of the plantation, and ordered an account to be taken by the master; and his decree is now assigned as error.

L. W. GARNETT, for appellant.

JNO. T. LOMAX, *contra*.

A. J. WALKER, C. J.—[July 9, 1861.]—The complainant's deceased husband removed from his plantation, in 1851, to a town distant about five miles, and thence forward until his death, in 1852, resided in the town; drawing his supplies from the plantation, having no business save the superintendence of the plantation, and no income except from the plantation. The majority of the court are of the opinion, that the plantation of the deceased was not, within the meaning of section 1359 of the Code, "*connected with the dwelling-house where the deceased most usually resided next before his death,*" and that the widow was not entitled to the possession of the plantation until her dower was assigned her. They think, that the same reasoning which would make the plantation so connected in this case, would produce the same result if the plantation were a hundred miles distant from the residence, and would give the widow the possession, as her quarantine, of two or more plantations within a few miles of the residence. They think, that to hold the plantation in this case to be within the statute, would be inconsistent with the spirit and intent of the law, and would establish a precedent which might lead to most unjust and unreasonable consequences. I would myself prefer a different conclusion, and I think the previous decisions of this court sustain the widow's right to possess the plantation until her dower was assigned.—Pinckard v. Pinckard, 24 Ala. 250; Smith v. Smith, 13 Ala. 329.

[2.] The complainant had a right to come into chancery to recover damages for the detention of her dower; and the measure of her damages would be one-half the rent, (the deceased having left no descendants,) from the husband's death, until the dower was assigned.—Perrine v. Perrine, 25 Ala. 644; Slatter v. Meek, *ib.* 528; Smith v. Smith, 13 Ala. 329-336.

[3.] As a defense to this suit, it is said by the defendant, that he carried on the plantation, and from the income he discharged the debts of the estate, leaving the entire

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personalty to be divided; that there was a large balance in his hands, after the payment of the debts and expenses of administration; and that one half of this balance was, under a decree of the probate court, paid to the complainant. The argument, we suppose, is, that the complainant, in having the income of the plantation appropriated to the payment of the debts of the estate, and the personalty thus saved from sale to pay the debts, and in receiving one-half the balance of the income, has received the benefit of one-half the rent of the land. The income from the plantation was the product of the soil, the labor of the slaves and animals, the implements of husbandry, and the skill and industry of the supervisor, undistinguishably commingled. It is not true, therefore, that the income stood to the complainant in the place of the rent of the land. It was the product of the commingled elements above stated, one of which was the use of the land; and to one-half the benefit of all the others she was entitled as a distributee of the estate. By virtue of a right altogether distinct from her dower, she was entitled to her distributive share, after the payment of debts and expenses, in the product of all the agencies employed, except the use of the land; and to one-half that she was as dowress entitled. The doctrine of election obliges a party, having inconsistent rights, to choose between them. No such inconsistent rights exist here, between which a choice could have been made. The complainant could not have given up the income derived from the land, or the benefit accruing to her from the discharge of debts and expenses out of it, without at the same time yielding up her right as a distributee, which she could not be required to do.

If, however, the executor in good faith cultivated the land, and the distributees have accepted the benefit of his use of the land, he is entitled to a credit out of the assets for the rent which may be recovered from him by the complainant.—*McCreliss v. Hinkle*, 17 Ala. 459; *Gerald v. Bunkley*, *ib.* 170. And if, upon the recovery by the complainant of her rents, it should be the case, that, with

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the charge upon the estate thus superadded, the amount received by the complainant, as a distributee, should exceed her share, then the defendant would be entitled to recover the excess from her.—*Sellers v. Smith*, 11 Ala. 264. Should the defendant have such right against the complainant, we see no reason why the balance should not be adjusted in this case; and if necessary, the pleadings may be amended for that purpose.

Reversed and remanded.

COOK vs. BAINE.

[TRESPASS AGAINST SHERIFF, BY PURCHASER FROM DEFENDANT IN EXECUTION.]

1. *Right of defendant in execution to sell or exchange property exempt from levy and sale.*—The act of Feb. 14, 1854, (Session Acts 1853-4, p. 242,) repealing section 2464 of the Code, also repealed the prior act of Feb. 7, (ib. 69,) amendatory of said section; and the repeal of these statutes removed all restrictions on the right of the defendant in execution to sell or dispose of property exempt from levy and sale.
2. *What property is exempt from levy and sale.*—If the defendant in execution, being the head of a family, owns but one horse, and no mule or oxen, the horse is exempt from levy and sale under execution, (Code, § 2462,) although said defendant also owns slaves.
3. *Action by purchaser of exempt property, against officer making levy.*—A purchaser from the defendant in execution, of property exempt from levy and sale, may maintain an action against the sheriff, for a subsequent levy and sale, without making the affidavit required by the statute (Code, § 2466) from the defendant in execution.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by William A. Baine, against John P. Cook, to recover damages for the tortious seizure and sale of a horse; and was commenced on the 25th

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March, 1859. No pleas appear in the record. The bill of exceptions is as follows: "On the trial of this cause, there was proof tending to show, that the plaintiff purchased the horse in controversy, with his wife's money, from one W. D. Henson, to whom said horse belonged at the time of said purchase; that said Henson then resided in this State, and was a man of family, and had no other horse, nor any mule or oxen, but had negroes; that the defendant, who was the deputy sheriff of said county, had an execution in his hands against said Henson before and at the time of said purchase by plaintiff, and afterwards levied said execution on said horse; that the horse was a work-horse; that said Henson, after the sale to the plaintiff, removed from the State, with his property; and that no claim was made for said horse, under the provisions of the exemption law. The court charged the jury, among other things, that if there was an execution in the defendant's hands against Henson, and said Henson was then a man of family, and resided in this State, and had a work-horse, and no other horse, nor any mule or oxen, and sold said horse to plaintiff before the levy of said execution,—then, under these circumstances, there was no lien on the horse in the hands of the plaintiff; and if the defendant afterwards levied on the horse, he would be a trespasser, as against the plaintiff, although no claim of exemption, by affidavit or otherwise, was made by the defendant in execution." The defendant excepted to this charge, and he now assigns the same as error.

G. F. SMITH, for appellant.

T. B. WETMORE, *contra*.

STONE, J.—[Jan. 21, 1861.]—The legislation of the session of 1858-4, in regard to property exempt from execution, is somewhat confused. Two several statutes were passed at the same session, bearing on section 2464 of the Code.—See Pamphlet Acts 1858-4, pp. 62 and 242. Section 2464 of the Code had provided, that "neither the head of the family, nor any member thereof, has the

power to sell or dispose of the property thus exempt from sale or levy; and if sold and taken possession of by the purchaser, or if abandoned by the family, by the death or dispersion of its members, is liable for the debts existing at the time the exemption was claimed." The act approved February 7th, 1854, (Acts, 69,) declared, "that section 2464 (of the Code) be so amended, that the head of any family may exchange the property reserved for the use of said family, for property of like kind, or for other property exempt from sale or levy, without subjecting said property to sale or levy in the hands of the transferee." Then came the act approved February 14, 1854, which declared, "that section 2464 of the Code of Alabama be, and the same is hereby, repealed."—Pamphlet Acts 1853-4, 242.

It will be seen that the act of February 7th, 1854, was but a modification of section 2464 of the Code. It only removed some of the restraints which the Code had imposed on the power to *sell and dispose* of property exempt from sale or levy. It might appropriately appear as a proviso to section 2464; thus limiting the operation of the restricting clause. In such case, its language would be, "*provided, that the head of any family may exchange any property reserved for the use of said family, for property of like kind, or for other property exempt from sale or levy, without subjecting said property to sale or levy in the hands of the transferee.*" The second section of the act of February 7th was but an amendment of section 2464 of the Code, and had no field to operate upon, except that which had been occupied by that section. It follows that, when section 2464 of the Code was repealed by the later statute of February 14, the second section of the act of February 7th had nothing to operate upon, and fell also. This presents the question for our decision, freed from the provisions and restrictions which section 2464 of the Code had imposed.

[2.] This suit was for wrongfully taking and disposing of a work-horse, the alleged property of Mr. Baine. The seizure complained of was a levy on the horse by Mr.

Cook, as deputy sheriff, under an execution against one Henson. Henson had owned the horse while the execution was in the hands of the sheriff; and the horse was thus liable to the execution, unless section 2462 of the Code protected him from levy and sale. Henson, during the time the execution had been in the sheriff's hands, was a citizen of Alabama, the head of a family, and owned no other horse, mule or oxen. It is thus clear that the said work-horse was exempt from levy and sale all the time he was owned by Mr. Henson; and the law imposed no restraint on his right to sell and dispose of him.—See Code, § 2462, subd. 8.

[8.] Mr. Baine, then, by his purchase, became the rightful owner of the horse; and there was no lien upon the property, which followed it into his hands.—See *Simpson v. Simpson*, 80 Ala. 225. Can he maintain this action for damages against the officer for making the levy? Section 2465 of the Code enacts, that “no sheriff, or other officer, levying on property exempt from execution, is liable for any damages therefor, unless the defendant, or some other person for him, make affidavit that the property about to be levied on is exempt from execution, and exhibit the same to such sheriff or officer.” The question arises, does this section of the Code bear on this case, or is it confined in its operation to cases in which the defendant in execution is the plaintiff? We confess we find difficulties in any solution we may give of this question. We hold, however, that its language confines it to cases of suits by the party in whose favor the exemption is claimed. The affidavit is required to be made by *the defendant, or some other person for him*; and when the affidavit is made, and delivered to the officer, he is required to *deliver the property, on demand, to the defendant*. Code, § 2466; Acts 1858-4, p. 69. Under these views, it was not necessary to the maintenance of this action, that affidavit should be made pursuant to section 2465 of the Code.

Judgment affirmed.

BARKER vs. BELL.

[REAL ACTION IN NATURE OF EJECTMENT.]

1. *Validity of unrecorded mortgage; general charge on evidence.*—In the absence of actual notice, an unrecorded mortgage is void, as against a purchaser at execution sale against the mortgagor; consequently, where the plaintiff claims under a mortgage, and the defendant under a purchase at execution sale against the mortgagor, a general charge to the jury, in favor of the plaintiff's right to recover, is erroneous, unless it is proved that the mortgage was duly recorded, or that the defendant had actual notice of its existence.
2. *Sale of mortgaged premises, under execution at law, for part of mortgage debt.*—In this State, a sale of mortgaged lands, under execution at law, for a part of the mortgage debt, passes no title or interest to the purchaser, unless there has been a previous surrender of the legal title by the mortgagee; and such surrender cannot be implied, in a court of law, from the facts, that he was present at the sale, made no objection to it, and afterwards received from the sheriff the proceeds of the sale; consequently, the lien of the mortgage is not thereby discharged, nor is the mortgagee, or a subsequent purchaser at the mortgage sale with notice of the facts, thereby estopped from recovering the land in an action at law.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by Mrs. Matilda Bell, against William N. Boothe, tenant in possession, to recover the possession of two town-lots in Cahaba, with damages for their detention; and Stephen B. Barker, the landlord of Boothe, was made a party on his own motion. The plaintiff claimed the lots under a purchase at a sale made by John S. Mayes, as the administrator of John R. Bell, deceased, under a mortgage executed to said Bell by one Jeremiah Duckworth; while the defendant asserted title under a purchase at sheriff's sale, under sundry executions against said Duckworth, one of which was in favor of said Mayes, as administrator of said Bell. On the trial, as the bill of exceptions states, the plaintiff read in evi-

dence, "after proving its execution and probate," the mortgage from Duckworth to Bell, (which was dated the 29th November, 1855; was given to secure the payment of two promissory notes, each bearing even date with the mortgage, and payable on the 1st January, 1857, and 1858, respectively; and contained a power of sale, on default being made in the payment of either note at maturity;) and then proved the non-payment of the second note, the advertisement and sale of the premises under the mortgage, her purchase at the sale, and the deed for the premises executed to her by the mortgagee's administrator, which was dated the 9th March, 1858. The defendant then proved the sale of the premises by the sheriff, under sundry executions against said Duckworth, his purchase at the sale, and the sheriff's deed to him, which was dated the 2d November, 1857. "It was admitted, that one of said executions against Duckworth was in favor of said Mayes, as the administrator of said John R. Bell, and was issued on a judgment obtained on the first of said notes secured by said mortgage; but that neither said Mayes nor his counsel ordered a levy and sale of said property under said execution, and that said levy and sale were made by the sheriff on his own motion. The defendant proved, also, that Mayes was present at said execution sale, and made no objection to it, and afterwards received from the sheriff his *pro-rata* share of the proceeds of sale; and that at the subsequent mortgage sale, at which the plaintiff purchased, he (defendant) gave public notice of his possession and claim of title, and that the purchaser would buy a law-suit."

On this evidence, the court charged the jury, "that, if they believed the evidence, they must find for the plaintiff." The defendant excepted to this charge, and then requested the court to instruct the jury—"1st, that, if the mortgagee, Mayes, sued upon the first note secured by the mortgage, and sold the whole property under an execution on his judgment, (with other executions,) and received his *pro-rata* share of the proceeds of the sale, such sale destroyed the lien of the mortgage, and the

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defendant got a good title against the mortgagee; 2d, that if the defendant was in possession under such execution sale, and was so holding, under a *bona-fide* claim of title, at the time of the mortgage sale, and gave public notice of his claim at that sale, then the plaintiff got no title by her purchase, and she could not recover." The court refused each of these charges, and the defendant excepted to their refusal.

The charge given by the court, and the refusal of the charges asked, are now assigned as error.

GEO. W. GAYLE, and THOS. H. LEWIS, for the appellant.

1. The sale under execution, at which the defendant purchased, destroyed the lien of the mortgage.—1 Hilliard on Mortgages, 450, note; 2 *ib.* ch. 28, §§ 13, 41; *ib.* ch. 30, §§ 14, 16, 17; Coote on Mortgages, (588,) 612; Pierce v. Potter, 7 Watts, 475; Berger v. Heister, 6 Whar. 210; Freeby v. Tupper, 15 Ohio, 467; Hartz v. Woods, 8 Barr, 471; Longworth v. Flagg, 10 Ohio, 380; Reedy v. Burgest, 1 Ohio, 157; Duval's Heirs v. McLoskey, 1 Ala. 727; Ridgway v. Longmacker, 18 Penn. 219; 2 Blackf. 245; 2 Rawle, 56; 7 Missouri, 489; 1 Denio, 407; 1 Comstock, 496; 2 B. Monroe, 207.

2. The mortgagee cannot sell the equity of redemption under execution.—Washburn v. Goodwin, 17 Pick. 137; Atkins v. Sawyer, 1 Pick. 351; Williams v. Powell, 14 Ala. 476.

3. The mortgagee cannot, after selling the mortgaged lands under execution for a part of his debt, proceed against the same lands, in the hands of the purchaser, for the balance of his debt.—Buford v. Smith, 7 Missouri, 489; 2 Hilliard on Mortgages, 45.

4. The mortgagee's conduct at the execution sale, in failing to make any objection to it, estops him from afterwards setting up any title to the property.—1 Johns. Ch. 354; 6 *ib.* 186; 19 Wendell, 557; 21 Wendell, 172.

5. The plaintiff's purchase was champertous and void. Herbert v. Harrick, 16 Ala. 581; Denton v. Allen v. Nel-

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son, 6 Ala. 68; Coleman v. Hair, 22 Ala. 596; Abernathy v. Boazman, 24 Ala. 189.

J. D. F. WILLIAMS, *contra*.—1. The equity of redemption is subject to sale under execution at law.—Code, § 2455. The sale under execution, at which the defendant purchased, conveyed only the equity of redemption, and had no effect on the subsequent mortgage sale.

2. The mortgagee's presence at the execution sale, and his failure to object to it, cannot estop him, or a purchaser from him, from recovering the property at law.—Steele v. Adams, 21 Ala. 584; McPherson v. Walters, 16 Ala. 714; Walker v. Murphy, 34 Ala. 591; Brinkerhoof v. Lansing, 4 John. Ch. 66.

R. W. WALKER, J.—[Feb. 14, 1861.]—1. In the absence of actual notice, an unrecorded mortgage is void, as against a purchaser at a sale under execution against the mortgagor.—Code, §§ 1287–8. The bill of exceptions purports to set out all the evidence; but it fails to show either the registration of the mortgage, or actual notice to the defendant of its existence. As the plaintiff was not entitled to recover, unless the mortgage was duly recorded, or the defendant had notice of its existence, the court erred in charging the jury, that, if they believed the evidence, they must find for the plaintiff.

[2.] It is highly probable, however, that proof of notice was made, and that this part of the evidence has been inadvertently left out of the bill of exceptions. We shall, therefore, consider the question which would be presented by a record which showed, in addition to the facts now before us, either the due registration of the mortgage, or actual notice of its existence to the defendant at the time of his purchase. In that case, the question would be, whether a sale of the mortgaged property under execution at law, for a part of the mortgage debt, by the direction, or with the knowledge and consent of the mortgagee, and his subsequent reception of the proceeds of the sale from the sheriff, discharge the lien of the mortgage, or

estop the mortgagee, or a subsequent purchaser at the mortgage sale with notice of the facts, from recovering the land in an action at law.

In *Jackson, ex dem. Ireland, v. Hall*, (10 Johns. 481,) it was held, that where a creditor, secured by mortgage, brings his action for the debt so secured, recovers judgment, and issues execution, which is levied, by his direction, on the mortgaged premises; and the same are sold, under such execution, to a purchaser having notice of the mortgage,—the latter acquires nothing but the equity of redemption, and the mortgagee may recover the possession by action at law. In this State, after a careful consideration of the question, it has been held, that the mortgagor's equity of redemption cannot be sold, under execution at law, for the whole or a part of the mortgage debt; and the effect of the decision is, that a sale of the property, under such execution, passes nothing to the purchaser.—*Powell v. Williams*, 14 Ala. 476. See, also, *Goring v. Shreve*, 7 Dana, 65; *Surgest v. Thomas*, *ib.* 221; *Bronston v. Robinson*, 4 B. Monroe, 142; *Camp v. Cox*, 1 Dev. & Batt. L. 52; *Atkins v. Sawyer*, 1 Pick. 351.

After the law-day of the mortgage, the legal estate is absolutely vested in the mortgagee; the mortgagor has nothing left but an equity of redemption.—*Paulling v. Barron*, 32 Ala. 11. As this equity of redemption is the only interest which the mortgagor has in the property, this is all that can be sold under execution against him; and even this interest cannot be sold, *if the execution is for the debt secured by the mortgage*. It follows, therefore, that a sale of the mortgaged property, under execution for the mortgage debt, is wholly ineffectual as a conveyance of title to the purchaser, unless there has been a surrender by the mortgagee of the legal title, with which (after the law-day) he is clothed by the mortgage. It is only by virtue of such surrender that the mortgagor can have a title subject to levy and sale under such an execution. Without such surrender, the legal title is in the mortgagee, and only an equity of redemption in the mortgagor; and as the mortgagor cannot be stripped of his right to

redeem by such a sale, nothing passes to the purchaser.

Unless it can be shown, therefore, in the present case, that the mortgagee has done something which amounts to a surrender of his legal title to the mortgagor, the latter had no interest which could be reached by this execution. Such a surrender is sought to be implied from the fact, that Mayes, the administrator, was present at the execution sale, made no objection thereto, and subsequently received, in part payment of a judgment for a part of the mortgage debt, a portion of the money paid by the defendant. It may be true that, when the mortgagee either directs a sale of the mortgaged property under execution, for the whole or any part of the mortgage debt, or knowingly sanctions such sale, and receives the proceeds, he would be thereby precluded, in a court of equity, from afterwards setting up the mortgage title against the purchaser.—See *Waller v. Tate*, 4 B. Monroe, 531. But it is settled in this State, beyond the reach of controversy, (whatever may be the rule elsewhere,) that a parol estoppel cannot operate a transfer of the legal title to land.—*McPherson v. Walters*, 16 Ala. 714; *Smith v. Munday*, 13 Ala. 182; *Walker v. Murphy*, 34 Ala. 591. The largest effect that could possibly be given to the acts and declarations of the administrator in this case, would be to hold, that they amounted to a statement by him that the title of the mortgagee was extinguished. Even if we go a step further, and concede that the defendant bought the land in reliance upon this statement, these facts combined would not, in a court of law, preclude the mortgagee, or a purchaser at the mortgage sale, from a recovery in ejectment against the defendant.—*Authorities supra*; also, *Swink v. Sears*, 1 Hill, 17; *Delaplaine v. Hitchcock*, 6 Hill, 17.

Where the mortgage is of real estate, nothing less than a payment, or something equivalent to a payment of the mortgage debt, a release in writing of the mortgage, or a re-conveyance in terms, can operate, in a court of law, a divestiture of the legal title of the mortgagee.—See *Haddock v. Bulfinch*, 31 Maine, 246; *Crosby v. Chase*,

5 Shepl. 369; Hoyt v. Swift, 13 Verm. 129. It has even been questioned, whether payment of the debt, after the law-day of the mortgage, without an actual re-conveyance, restores the fee to the mortgagor, or will enable him to recover in ejectment against the mortgagee.—See 4 Kent, 193-4, and notes; Collins v. Robinson, 83 Ala. 94; Doton v. Russell, 17 Conn. 446. In this case, there has been neither payment of the debt, release in writing of the mortgage, nor actual re-conveyance of the fee; and the mortgage title must, in a court of law, stand unimpaired.

The rule declared in Wallis v. Long, (16 Ala. 738,) and Acker v. Bender, (33 Ala. 230,) that the title which is conveyed to the mortgagee may be released at law by a subsequent verbal contract, providing for the discharge of the mortgage, but leaving the debt it was given to secure unaffected, must be limited, as it was in those cases applied, to mortgages of personal property. If the subsequent verbal contract was for the release of the mortgage debt, the case might be different. The debt, even when secured by a mortgage on real estate, may be released by subsequent verbal contract; and the release of the debt has the same effect as its payment.—See 1 Cowen, 122; Armitage v. Wickliffe, 12 B. Monroe, 488, 497.

There are, it is true, decisions to the effect, that the lien of a mortgage is discharged, by a sale under a judgment for the whole or a part of the debt secured by the mortgage.—Pierce v. Potter, 7 Watts, 477; Berger v. Heister, 6 Whart. 210; Bank v. Chester, 11 Penn. St. R. 282; Clarke v. Stanley, 10 Barr, 472; Ridgway v. Longmaker, 18 Penn. St. R. 215; Freeby v. Tupper, 15 Ohio, 467; Lessee of Fosdick v. Risk, *ib.* 84. But these decisions are made to rest upon reasons which cannot operate with us, because they assume the existence of certain rules of law, which have been denied a place in our jurisprudence.

In Pennsylvania, it seems to be the rule, that the mortgaged lands may be sold under execution at law for the mortgaged debt; and that, in such case, the sale works

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the same effect as though the proceeding were under the mortgage itself. The mortgagee has the option to proceed, either by *scire facias* on the mortgage, or by action of debt on the bond; and when judgment is obtained in either proceeding, he may sell the mortgaged land. "The writs, it is true, bear different names; but there is no more virtue in a sheriff's sale on a *levari facias*, than in a sheriff's sale on a *venditioni exponas*. The one, as well as the other, sells the estate; and when the estate is sold for the mortgage debt, or any part, the whole estate, legal and equitable, is sold, unincumbered, to the purchaser, whatever the name of the writ under which the sheriff acts."—Clarke v. Stanley, 10 Barr, 474, 476, 478-82; Bank v. Chester, 11 Penn. St. R. 287-8. The very reverse of this is the rule in this State; for the result of the decision in Powell v. Williams, (14 Ala. 476,) is, that the mortgaged lands cannot be sold under execution at law for the mortgage debt, and that such sale passes nothing to the purchaser.

In Ohio, the decisions referred to are placed, partly, on the ground that, by the statute law of that State, lands cannot be sold without appraisal, and for no less sum than two-thirds the appraised value; and partly, also, on the ground, that a mortgagee, who causes the mortgaged premises to be sold as the property of the mortgagor, is thereby estopped from setting up his title against the purchaser. It must be remembered, that our doctrine in reference to the application of estoppels *en pais* to the title to land, does not prevail in either Ohio or Pennsylvania. On the contrary, the rule in both of those States is, that the holder of the legal title to land may, by acts *en pais*, be estopped, even in a court of law, from asserting his title.—Hamilton v. Hamilton, 4 Barr, 193; Bigelow v. Barr, 4 Ohio, 358; Buckingham v. Smith, 10 Ohio, 298.

It is obvious, therefore, that the cases to which we have referred, as in conflict with the view we have taken of this question, proceed on grounds which our previous decisions have rendered inapplicable here.

Judgment reversed, and case remanded.

WARE vs. GREENE.

[SUMMARY PROCEEDING AGAINST TAX-COLLECTOR AND SURETIES.]

1. *Parties*.—In a summary proceeding against a tax-collector and his sureties, (Code, §§ 2596-97, 2628, 2632,) for his failure to pay into the State treasury the taxes collected by him, the unexplained omission of one of the sureties from the notice is fatal to the proceeding.
2. *Statute of limitations*.—The State not being expressly included in the act of 1832, (Olay's Digest, 389, § 90,) which prescribes six years as the limitation of actions against the sureties of public officers, that statute does not apply to a summary proceeding against a tax-collector and his sureties, instituted in the name of the comptroller of public accounts, for the use of the State.

APPEAL from the Circuit Court of Montgomery.
Tried before the Hon. JNO. GILL SHORTER.

THIS was a summary proceeding, instituted in the name of W. J. Greene, the comptroller of public accounts, for the use of the State, against John C. Burgess, tax-collector of Coosa county for the year 1845, and James L. Burgess, A. C. Mahan, Hamilton Ware, and R. L. Lauderdale, as the sureties on his official bond; and was commenced on the 18th May, 1857. The defendant Ware craved oyer of the bond, (which was set out,) and demurred to the notice, because W. C. Whetstone and Allen Thomas, who were also obligors jointly with the other defendants, were not included in the notice, as defendants to the proceeding. The demurrer being overruled, said Ware then pleaded the statute of limitations of six years; alleging, that he signed the bond only as the surety of John C. Burgess. The court sustained a demurrer to this plea; and its rulings on the pleadings, with other matters, are now assigned as error.

CHILTON & GUNTER, for appellant.

M. A. BALDWIN, Attorney General, *contra*.

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A. J. WALKER, C. J.—[June 20, 1861.]—This is a summary proceeding for a tax-collector's default. There are six sureties on the bond, and the notice is issued against only four of the sureties. The omission of two of the sureties is not in any way explained. This omission is fatal to the proceeding. The proceeding is summary, and highly penal, and must be pursued in strict conformity to the law authorizing it.—Code, §§ 2632, 2633, 2596, 2597. The sections of the Code referred to show that the proceeding authorized is against the tax-collector and his sureties; but there is no authority to issue a notice against only a part of the sureties. It may be that, under section 2597, judgment might be rendered as to so many of the sureties as received notice, omitting those who were not served with notice. But neither that section, nor any other, authorizes the unexplained omission from the notice, by which the proceeding is instituted, of a portion of the sureties. The absence of an authority to proceed, as was done in this case, against a part of the sureties, omitting the others, is fatal to the notice.—*Collier v. Powell & Bradley*, 23 Ala. 579.

[2.] We deem it necessary to notice only one other question presented by the record; and that is, whether the statute of limitations is available to the sureties of the tax-collector. This is a proceeding by the State; and it is an established doctrine, that no statute of limitations can operate against the State, unless the State is expressly included.—*Ang. on Lim.* §§ 34, 35, 36; *Sedgwick on Stat. and Con. Law*, 105; *U. S. v. Hoar*, 2 Masop, §11. The statute prescribing a limitation as to actions against the sureties of public officers, does not include the State, and, therefore, has no application to this case.—*Clay's Dig.* 329, § 90. And it must be observed, that the question of the statute of limitations is in this case governed by the law as it was before the adoption of the Code.—*Session Acts, 1853-4*, p. 71.

Reversed and remanded.

BURDINE vs. GRAND LODGE OF ALABAMA.

[ACTION ON COMMON MONEY COUNTS.]

1. *Judicial notice of free-masons as charitable corporation.*—The courts of this State will take judicial notice of the fact, that the society of free-masons is a purely charitable corporation.
2. *Competency of corporator as juror, and as witness for corporation.*—The society of free-masons being a purely charitable corporation, a member of the society cannot be said to have the smallest pecuniary interest in the event of a suit to which the society is a party; consequently, he is a competent juror, and a competent witness for the society.
3. *Variance in description of corporation.*—The society of free-masons in this State being incorporated by the name of the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama and its Masonic Jurisdiction," and suing by that name, a charter granted by the "Grand Lodge of the State of Alabama," authorizing the persons to whom it is directed "to form themselves into a regular lodge of ancient free-masons, by the name of Yorkville Lodge No. 131," sufficiently appears to have been issued by said corporation, and the misdescription does not amount to a material variance.

APPEAL from the Circuit Court of Pickens.

Tried before the Hon. A. A. COLEMAN.

THIS action was brought by the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama and its Masonic Jurisdiction," against James T. Burdine. The complaint contained the common count for money had and received, and another on an account stated. The pleas were—1st, the general issue; 2d, payment; and, 3d, that the plaintiff never was a corporation authorized to sue on said causes of action. Before the trial was commenced, as the bill of exceptions shows, the defendant challenged for cause two of the jurors, who were shown to be members of subordinate lodges established under the authority of said grand lodge; and reserved an exception to the overruling of his objection. On the trial, the plaintiff offered in evidence an instrument of

writing, which was proved to be sealed with the seal of said grand lodge, and signed by D. Clopton, grand-master, P. Williams, deputy grand-master, S. H. Dixon, senior grand-warden, Geo. W. Gaines, junior grand-warden, and A. P. Pfister, grand-secretary, in the following words:

"We, the Grand Lodge of the State of Alabama, to all the enlightened, passed and raised, to whom these presents shall come, greeting: Know ye, that, by the high power vested in us, we do hereby authorize and empower the following well-beloved brethren," (naming seven persons,) "residing at or near Yorkville, in the county of Pickens, State of Alabama, to form themselves into a regular lodge of ancient free-masons, to be opened at Yorkville, by the name of Yorkville Lodge No. 131; and we do hereby empower the above-named brethren and their successors, with their constitutional number, to assemble and open a legal lodge, to confer the degrees of entered apprentice, fellow-craft, and master-mason, to admit members, and to do all other business appertaining to said degrees; conforming in all their doings to the by-laws of their lodge, and the constitution and by-laws of the Grand Lodge of the State of Alabama; for which purpose this shall be their sufficient warrant or charter. Given under our hands, and the seal of the Grand Lodge, at Montgomery, this 4th December, A. L. 5851."

(Signed and sealed as above stated.)

The plaintiff offered this document in evidence "to show that Yorkville Lodge No. 131 was under the jurisdiction of said grand lodge;" and the court admitted it for that purpose, against the defendant's objection, and he excepted to its admission. The plaintiff also read in evidence its charter of incorporation, as found in Clay's Digest, pp. 374-5; and then offered one Payne as a witness, who testified, *on voir dire*, "that he was a member of said grand lodge, and master of Yorkville Lodge No. 131." The defendant objected to the competency of said

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witness, and reserved an exception to the overruling of his objection. The testimony of Payne was to the effect, that the defendant had been treasurer of Yorkville Lodge No. 131, and was indebted to said lodge for a balance of money in his hands as such treasurer. The rulings of the court above stated, with others which require no particular notice, are now assigned as error.

TURNER REAVIS, for appellant.—1. It is one of the oldest maxims of the law, that a jury must be indifferently chosen; and that not only the smallest pecuniary interest, but even favor or bias towards a party, disqualifies a juror. Finch's Law, pp. 399-402; 3 Bla. Com. 368, m. p.; Hesketh v. Braddock, 8 Burr. 1856-7; Lynch v. Horry, 1 Bay, 229; Davis v. Allen, 11 Pick. 460; Wood v. Stoddard, 2 Johns. 194; Page v. Railroad Co., 1 Foster, 438. The jurors objected to could not have been unbiased, indifferent, or disinterested; for the corporation suing, of which they were members, is not only authorized to hold property, and to sue for money or other property, but "to do all other things concerning the estates and moneys of the lodge,"—an authority which would empower the members to divide among themselves the very money recovered in this case. It is, in effect, the case of one of the parties to a suit sitting as a juror on its trial.

2. For the same reasons, Payne was not a competent witness for the plaintiff; being really an integral part of the corporation, and giving evidence for himself. As a member of the corporation, the judgment would be evidence for or against him in any subsequent suit between him and any other members, for an account of the money, debts, and estate of the corporation; and in the event of a dissolution of the corporation, he would be entitled to a share of the money recovered in this suit.—Code, §§ 1489-90, 2651.

3. The instrument offered in evidence, as the charter of Yorkville Lodge No. 131, ought not to have been admitted. A corporation can only act in and by its corpo-

rate name. The charter of the subordinate lodge, therefore, emanated from some other body than the plaintiff; or, if granted by the plaintiff, was an unauthorized act.

E. W. Peck, contra.—1. The plaintiff is a purely charitable corporation, as this court must judicially know, even if the fact were not apparent on the face of its charter. The corporation being charitable, its members are competent jurors and witnesses.—1 Greenl. Ev. §§ 832-3; *M. E. Church v. Wood*, 5 Ohio, 283; 3 Phil. Ev. pp. 58-60, note 87; *Purple v. Horton*, 18 Wendell, 22.

2. No specific objection was made to the charter of the subordinate lodge; no material variance or misdescription of the corporation is shown by it; and it does not lie in the defendant's mouth, after acting under the charter, and receiving the money belonging to the lodge, to question the authority of the charter.

STONE, J.—[July 9, 1861.]—It is certainly a good and wholesome rule, which should be strictly regarded, that any pecuniary interest, even the smallest, in the event of the suit, will disqualify a person from serving on the jury charged with its trial. This rule is necessary as a protection to the public interest, and as a guaranty of that purity and integrity in the administration of the law, which alone can inspire respect for, and confidence in our judicial tribunals.—*Russell v. Hamilton*, 2 Scam. 56; *Lynch v. Horry*, 1 Bay, 229; *Wood v. Stoddard*, 2 Johns. 194; *Finch's Law*, 399; *Hesketh v. Braddock*, 3 Burr. 1856; *Davis v. Allen*, 11 Pick. 466; *Brittain v. Allen*, 2 Den. 120; *Page v. Railroad Co.*, 1 Foster, 438; 3 Black. Com. 833.

If, however, the society of free-masons is, in its financial policy, purely eleemosynary, or charitable, then the members of the grand lodge, as such, cannot be said to have any pecuniary interest in the result of the suit; and no other ground of challenge against these jurors being shown, the ruling of the circuit court, on the hypothesis stated, would be free from error.—*Com. v. O'Neil*, 8 Gray,

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343; M. E. Church v. Wood, 5 Ohio, 283; 1 Greenl. Ev. § 333; Nason v. Thatcher, 7 Mass. 298; Phil. Ev., Cow. & Hill's Notes, (edition of 1850,) vol. 3, pp. 58-9.

The society known as free-masons has long existed in this country, and in almost or quite every part of it. The purpose and objects of the society have been made public in numerous books, periodicals, and public addresses. From all these sources of information, and from the generally received and accredited judgment of the public, the sole purpose and object with which masonic institutions acquire money and property, beyond their current expenses as a society, (furniture, lights, fuel, stationery, and the like,) are for the bestowal of reliefs and charities to the needy. In addition, the 3d and 4th sections of the act to incorporate masonic lodges in the State of Alabama, tend to confirm the belief that the society is eleemosynary in its aims. Under these circumstances, we hold, that we will take judicial notice, that the grand and subordinate lodges of free-masons within the State of Alabama constitute a charitable or eleemosynary corporation.—Mayor of Wetumpka v. Winter, 29 Ala. 660; Salomon v. The State, 28 Ala. 88; Dozier v. Joyce, 8 Por. 303; Lampton v. Haggard, 3 Mon. 149; Jones v. Overstreet, 4 Mon. 547; Floyd v. Ricks, 14 Ark. 293; Stephen v. State of Georgia, 11 Ga. 241; Duncan v. Littell, 2 Bibb, 424; Sterne v. The State, 20 Ala. 43; Ward v. The State, 22 Ala. 16.

It results from what we have said above, that the circuit court rightly overruled the several objections to the jurors and to the witness.

[3.] It is also urged, that the circuit court erred in admitting in evidence the charter of the subordinate lodge, because of a variance between the corporate name of the grand lodge of free-masons as found in the act of incorporation, and that by which it granted the charter to the subordinate lodge.

In the leading case of the Mayor and Burgesses of Lynn, (10 Rep. 124,) it is said, that "*variances in syllabis et verbis, and not in sensu et re, are not material.*" It is further

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stated, as the rule for determining *when* the variance is immaterial, that *the descriptive words used shall import the certain and true name of the corporation*. In *Newport Mechanics' Manf. Co. v. Starbird*, (10 N. H. 125,) it is intimated as sufficient, "if there is enough expressed to show that there is such an artificial being, and to distinguish it from all others." In the case of *Doe, on demise of Mayor, &c., of Waldon, v. Miller*, (1 Barn. & Ald. 699,) the declaration stated a demise by "the mayor, aldermen, capital burgesses and commonalty of the borough town of Waldon." The act of incorporation given in evidence, named the corporation "the mayor, aldermen, capital burgesses, and commonalty of Waldon." The court of king's bench ruled the variance immaterial.—See, also, *Mayor, &c., of Stafford v. Bolton*, 1 B. & Pul. 43; *Inhab. of Middletown v. McConnee*, Pennington, (N. J.) 500, in margin; *African Society v. Varick*, 13 Johns. 38; *Midway Cotton Manf. v. Adams*, 10 Mass. 360; *Inhab. v. String*, 5 Halst. 323; *Milford and Chil. Turnpike Co. v. Brush*, 10 Ohio, 112; *Minot v. Curtis*, 7 Mass. 444; *Hagerstown Turnpike Road v. Creeger*, 5 Har. & Johns. 122.

In the case from 10th New Hampshire Reports, cited *supra*, it was said, that "the alteration or transposition of a word in the name [of a natural person] frequently makes an entirely different name; while the name of a corporation frequently consists of several descriptive words, and the transposition of them, or an interpolation, or omission, or alteration of some of them, may make no essential difference in the case."

In *Smith v. Plank-road Co.*, (30 Ala. 663,) we said, "there is a well-marked distinction between a misnomer, which incorrectly names a corporation; but correctly describes it, and the statement in the pleading of an entirely different party."—See, also, *McWalker v. Branch Bank*, 3 Ala. 158; *Crawford v. Bank*, 4 Ala. 313; *Smith v. Br. Bank*, 5 Ala. 26; *Hancock v. Br. Bank*, *ib.* 440; *Snelgrove v. Br. Bank*, *ib.* 295; *Crawford v. Br. Bank*, 7 Ala. 388; *Caldwell v. Br. Bank*, 11 Ala. 549; *Davis v. Branch*

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Bank, 12 Ala. 463; Com. Bank v. French, 21 Pick. 486; Angell on Corporations, §§ 98 a, 101, 645, *et seq.*

The name of the plaintiff below, as expressed in the act by which it was incorporated, is the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama, and its Masonic Jurisdiction." The charter which was issued to the subordinate lodge, to the admission of which in evidence exception was reserved, is in the name of "the Grand Lodge of the State of Alabama," is directed to certain persons by name, and authorizes them "to form themselves into a regular lodge of ancient free-masons, by the name of Yorkville Lodge No. 131." These marks of identification, we hold, sufficiently show that the charter was issued by the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama," and the only variance consists in the omission of some words, making no essential difference in the name. We think the corporation was identified by words sufficiently descriptive, to let it in as evidence; and, hence, we hold, that in this matter the circuit court did not err.

Affirmed.

ALA. & TENN. RIVERS RAILROAD CO. vs.
NABORS & GREGORY.

[ACTION ON SPECIAL CONTRACT AND COMMON COUNTS.]

1. *What proof is necessary to authorize recovery by plaintiff.*—In an action against an incorporated railroad company, founded on an instrument of writing executed by its secretary and treasurer, which, after acknowledging the receipt of certain notes as a loan to the company, states that the "loan is made on the conditions and terms stated in the resolutions of the board of directors passed on" a specified day, "and recorded on the minutes,"—the plaintiff cannot recover, either under the common money counts, or under a special count on the contract, without proving the conditions

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and terms of the loan, either by the production of the resolutions of the board of directors, or other competent evidence; and the fact that the resolutions are in the defendant's possession, does not affect the principle.

APPEAL from the Circuit Court of Dallas.

Tried before the Hon. NAT. COOK.

THIS action was brought by the appellees, and was founded on two instruments of writing, executed by A. M. Goodwin, as secretary and treasurer of the Alabama and Tennessee Rivers Railroad Company, acknowledging the receipt of certain notes loaned to said railroad company. The notes specified in one of the instruments were executed by one J. F. Dennis, and were therein acknowledged to have been received of him; and those specified in the other were executed and loaned by Regill, Roberts & Terrell. The instruments were in the following form:

"Office of Alabama and Tennessee Rivers
Railroad Company. }

"Received, Selma, June 16, 1856, of J. F. Dennis, his two notes of this date, for five hundred dollars each, one six months, and the other at twelve months, each with interest from date, as a loan to said railroad company, but to be used only in the event that the directors purchase iron in Mobile to extend the railroad to the other side of the Coosa river. This loan is made on the conditions and terms stated in the resolutions of the board of directors, passed June 13th, 1856, and recorded on the minutes.

"A. M. GOODWIN,

"Secretary and Treasurer."

The complaint contained four counts; the first count being in these words: "The plaintiffs claim of the Alabama and Tennessee Rivers Railroad Company three thousand dollars, for this: that the said defendant, on the 16th June, 1856, executed to James F. Dennis an instrument of writing in these words," setting out the instrument above copied. "And the plaintiffs aver, that by

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the resolutions of said board of directors, in said instrument mentioned, the said defendant was authorized to borrow money, and the same was, by said resolution, due and payable on the 1st June, 1859, bearing interest from the date of the loan; and the said defendant, on the 13th April, 1858, received from said Dennis the money due on said notes, with interest thereon, and applied said money, through its said board of directors, to the purchase of iron in Mobile to extend the railroad of said company to the east side of the Coosa river,—that being the side of the river described in said instrument as the 'other side of the Coosa river;' which said sum of money, so loaned to said defendant, is still due and unpaid; and the said instrument of writing was, on the 1st January, 1859, duly transferred and assigned to the plaintiffs, and is their property." The second count was founded on the instrument given to Regill, Roberts & Terrell for the notes loaned by them, and was the same as the first, *mutatis mutandis*. The third count claimed three thousand dollars, "due by account on the 16th June, 1856, to James F. Dennis, for so much money loaned by him to the defendant;" and the fourth claimed the same amount, as being due by account to Regill, Roberts & Terrell, for money loaned by them to the defendant; each count containing also an averment that "said account is the property of the plaintiffs."

On the trial, as appears from the bill of exceptions, the plaintiffs proved, by several witnesses, that the signatures to the receipts on which the action was founded were in the handwriting of said Goodwin; that said Goodwin was the defendant's secretary and treasurer, and acted as its general agent in signing similar receipts; that a public meeting was held in the city of Selma, "for the purpose of raising money for said railroad company by loan, to be used for the purposes stated in said receipts, which loans were made at the same time, and for the same purposes, as mentioned in said receipts;" that speeches were made at said meeting by several directors of the company, advocating subscriptions to the loan;

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and that receipts were given to the other subscribers similar to those above described. On this evidence, together with proof of the charter of the railroad company, the court allowed the plaintiff to read the receipts to the jury; and they then proved an endorsement on each of said receipts, in the handwriting of said Goodwin, acknowledging payment of the notes therein specified. This being all the evidence, the defendant asked the court to charge the jury, that, if they believed the evidence, they must find for the defendant; which charge the court refused to give, and the defendant excepted. The refusal of this charge, and the overruling of the defendant's objections to each part of the evidence offered by the plaintiff, to which exceptions were also reserved by the defendant, are now assigned as error.

ALEX. & JNO. WHITE, for appellant.—The plaintiffs proved the existence of a special contract, but failed to show its terms; consequently, they were not entitled to recover, either under their special count, or under the common counts.—*Snedicor v. Leachman*, 10 Ala. 382; *Clarke v. Smith*, 14 Johns. 826; *Raymond v. Bearnard*, 12 Johns. 275; *Tankersly v. Childers*, 23 Ala. 751; 1 Chitty's Pl. 352, n.

BYRD & MORGAN, *contra*.—The receipts show on their face a contract for the loan of money on the notes therein specified, and, taken in connection with proof of the payment of the notes, were sufficient to authorize a recovery by the plaintiffs. In the absence of evidence to the contrary, the money was due immediately; and if the terms of the contract were varied by the resolutions of the board of directors, it devolved on the defendant, who had the custody of the resolutions, to show that fact.

R. W. WALKER, J.—[June 17, 1861.]—The two instruments offered in evidence, after acknowledging the receipt of certain notes as a loan to the defendant, state

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that the "loan is made on the condition and terms stated in the resolutions of the board of directors passed June 13th, 1856, and recorded on the minutes." The resolutions referred to were not produced,—the failure to produce them was not accounted for,—nor was there any evidence whatever as to what were the conditions and terms of the loan therein set forth; and the question now presented is, whether, under this state of the proof, the plaintiffs had the right to recover, either upon the special contract, or on the common counts. We think it clear that they had not.

Where the existence of a special, unrescinded contract is disclosed by the evidence, the plaintiff must show its stipulations; otherwise, it is impossible to determine whether he has a right to recover. This plain principle controls the present case. The instruments executed by the secretary, on behalf of the company, showed upon their face that they did not contain the whole of the contract between the parties, but that a part of it, namely, the terms and conditions on which the loan was made, was set forth in another writing, particularly described and referred to. In the very nature of things, the right of the plaintiffs to recover must depend upon the terms and conditions of the loan; and, in the absence of proof as to what those terms and conditions were, the suit must fail. This is different from a general loan, without any special contract. In that case, the promise, and the time of re-payment, would be fixed by legal implication. But no such implication arises in favor of a plaintiff who proves that there was a special contract, defining the terms and conditions of the loan, but fails to show what that contract was.

It will not do to say, that it devolved upon the defendant, in whose possession they were, to produce the resolutions. It was for the plaintiffs to make out their case; and this they could not do, without showing that the day of payment had arrived, and that the defendant was in default; and whether or not this was so, depended entirely upon the terms and conditions of the loan.—*Kerstede v.*

Raymond, 10 Inda. 199, (204;) Whitford v. Tuten, 10 Bingh. 395; Snedcor v. Leachman, 10 Ala. 330; Clarke v. Smith, 14 Johns. 326; 1 Greenleaf's Ev. §. 87.

● If the plaintiffs had proved the contract, and then proved that it had been fully performed on their part, so that nothing remained to be done but the re-payment of the money, they might have recovered on the common counts. But this was not done. The evidence showed the existence, but not the stipulations of the contract. Snedcor v. Leachman, *supra*.

Judgment reversed, and cause remanded.

EX PARTE MAXWELL.

[APPLICATION FOR MANDAMUS TO PROBATE COURT.]

1. *Validity of grant of administration.*—The failure of an administrator to give bond, as required by the order appointing him, renders the grant of administration voidable only, and not absolutely void.

APPLICATION for a *mandamus*, or other remedial writ, to the probate court of Wilcox, to compel that court to grant to the petitioner, James F. Maxwell, original letters of administration on the estate of his father, James Maxwell, deceased, who died some time in the year 1845, seized and possessed of real and personal property in the county of Wilcox. The transcript from the records of said probate court, which was made an exhibit to the petition, shows that, on the 19th February, 1846, an order was made by said court in the following words: "It is ordered by the court, that Joseph VaDevoort, be, and he is hereby, appointed administrator of the estate of James Maxwell, deceased, and that he give bond, in the sum of three thousand dollars, for the faithful performance of the

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duties required of him as such administrator." On the 21st February, 1860, the petitioner applied to said probate court for the grant of original letters of administration on said estate; setting forth in his petition his right to the administration, and alleging "that letters of administration have never been granted to any person upon said estate, nor bond given, nor oath of office as administrator taken by any person." The probate court dismissed the petition, on the ground that VaDevoort had been appointed administrator of said estate. The petitioner then made application to the circuit court of Wilcox, (Hon. NAT. COOK presiding,) for a *mandamus* to the probate court; insisting that the grant of administration to VaDevoort was void, because he had never given bond, with sureties, as required by the statute and the order of his appointment. The circuit court refused to grant the writ, and the petitioner now renews his application to this court.

GEO. W. GAYLE, for the motion.

A. J. WALKER, C. J.—[March 19, 1861.]—Without inquiring whether the giving of the bond by VaDevoort would be conclusively presumed, or, if it would not, whether the failure to give the bond is shown by the evidence, we dispose of this case by deciding, that the failure to give the bond would not render the administration void. The law draws a distinction, between administrations which are void, and those which are repealable, or revocable. The grant of administration is not void, unless there was a want of jurisdiction to make it.—*Miller v. Jones*, 26 Ala. 247; *Gayle & Pitts v. Blackburn*, 1 St. 429; *Wales v. Willard*, 2 Mass. 120. If the court had jurisdiction over the subject-matter of the grant of administration in the absence of a bond, the administration is not void, but simply revocable, or voidable. Jurisdiction is the power to hear and determine a cause; and if the court had authority by law to hear and determine upon an application for the administration in

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the absence of a bond, then the order granting the administration is *coram judice*, and not void.—United States v. Arredondo, 6 Peters, 709; State of Rhode Island v. State of Massachusetts, 12 Peters, 719; Grignon's Lessee v. Astor, 2 Howard, 338.

The giving of the administration bond is not by the law made a condition, upon which the court is to hear and determine upon the matter of an application for administration. On the contrary, the giving of the bond, by way of qualifying the appointee of the court, must necessarily be posterior to the hearing and determination upon the application. The language of the law is, "In all cases, *before granting letters of administration, the administrator shall enter into bond,*" &c.—Clay's Digest, 221, § 3. This language clearly implies, that there is to be an administrator; that the court is to act upon the application, and designate its appointee, before the bond is given. This is still more clearly shown by the condition of the bond, prescribed in the same law, as follows: "The condition of the above obligation is such, that, whereas the above-bound ——— has been duly appointed *administrator,*" &c. Thus, the very law, which requires the giving of a bond before the grant of letters of administration, declares, in prescribing the condition of the bond, that an administrator had been before "duly appointed." The intention of the law, doubtless, is, that the court shall, immediately upon announcing its judgment as to the appointment of an administrator, and before issuing letters of administration, and before the administrator performs any official act, require the bond to be given; and this view of the statute, more nearly than any other, gives effect to all its words, and adopts a construction susceptible of practical application.

We admit, that it is difficult to reconcile some of the expressions of the opinion in *Cleaveland v. Chandler*, (3 St. 489,) with our conclusion. But the real point in that case was, whether an executor could, under our law, as he might have done under the common law, execute the trust, without obtaining from the proper court the

grant of letters testamentary. What is said by the court as to the necessity of the executor's qualification, by taking the oath, and giving the bond prescribed, was produced as an argument, to show that, under our system, it was necessary that an executor should obtain letters testamentary. It may very well be argued, that to allow an executor to act without the grant of letters testamentary, would practically annul the statute requiring bond and oath; and that, therefore, the rule of the common law was changed in this State. But that argument involves no denial of the validity of an order granting administration without the requisite bond and oath. To allow that decision the effect as an authority which is claimed for it, would give its expressions an effect not in the mind of the court which made them, and altogether foreign to their purpose. In the case of *Savage v. Benham*, (17 Ala. 119,) the validity of an administration was assailed, upon the ground that the administratrix was an infant at the time of her appointment, and could not comply with the statutory requisition as to giving bond. The court held, that the appointment was, at most, only voidable, and that it could not be declared void in a collateral proceeding. This authority is very much in point, and is entitled to great consideration, because it is made in reference to a similar question.

In the recent case of *Gray's Adm'rs v. Cruise*, (36 Ala. 559,) the appointment of Brewer, unlike the appointment in this case, was conditional. The order was, that he be appointed administrator on his executing and filing bond. The condition not having been complied with, it was held, not that an appointment actually made was void, but that no appointment was made. Therefore, the question decided in that case, is totally unlike that which arises in this.

Looking to the decisions in other States, we find the proposition, that an administration, under such a law as ours, is not absolutely void, well sustained. In *Palmer v. Oakley*, (2 Douglass' Mich. Rep.) it is maintained, that a guardianship, granted to a *feme covert*, who is incapable

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of binding herself by contract, would not be collaterally assailable, notwithstanding the law might require that guardians should execute bonds.—See, also, *Russell v. Coffin*, 8 Pick. 143. In New York, the statute required that an administrator should, before receiving letters, execute a bond with two or more sureties; yet it was decided in *Bloom v. Burdick*, (1 Hill, 130,) that an omission in that particular did not render an administration void. *Dayton on Surrogates*, 223; 2 *Bradford's Rep.* 22. See, also, *Janett v. State*, 5 G. & J. 27; *Ray v. Doughty*, 4 Blackf. 115; *Westcott v. Cady*, 5 Johns. Ch. 385.

The distinction between irregularities, which render a judicial proceeding voidable, and the absence of facts which are made conditions precedent, was long since drawn by this court, and has been since steadily maintained.—*Wyman v. Campbell*, 6 Porter, 119; *Matheson v. Hearin*, 29 Ala. 210. The failure to take the proper administration bond is a mere irregularity, or error, in the proceedings of a court having jurisdiction; and, therefore, the administration of *Joseph VaDevoort* was valid until repealed, and the petitioner is not entitled to an original and primary administration upon the estate. If the former administration is terminated, by death or resignation, an administration *de bonis non* is the only proper administration.

Motion refused.

EX PARTE NORTHINGTON.

[APPLICATION FOR MANDAMUS TO CIRCUIT COURT.]

1. *Liability of lunatic for necessities*.—An adult person, who is *non compos mentis*, is liable on an implied contract for necessities furnished him, suitable to his estate and condition in life; and where no guardian has been appointed for him, an action for the

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value of such necessities must necessarily be prosecuted against him personally.

2. *How lunatic must defend.*—When an action is brought against an adult person who is *non compos mentis*, he must be defended by an attorney, to be appointed by the court, if necessary; and if the court refuses to let the plaintiff proceed with his action,* “unless he first have a guardian appointed by the probate court, and notify the guardian of the pendency of the suit,” a *mandamus* will be awarded by the supreme court, at the instance of the plaintiff, to compel the appointment of an attorney for the defendant.

APPLICATION by William H. Northington, as the executor of John D. Fralick, deceased, for a *mandamus, procedendo*, or other appropriate writ, process, or order, to be directed to the circuit court of Autauga, to compel that court to allow the petitioner to proceed in a certain cause, therein pending, in which the petitioner, as executor of said Fralick, was plaintiff, and one John R. Williams was defendant. It appeared from the transcript which was made an exhibit to the petition, that said Fralick commenced an action at law against said Williams, by ordinary summons and complaint, on the 25th January, 1860, to recover the sum of \$150, alleged to be due for the use and occupation of a town lot in Prattville; that at the March term, 1860, it was suggested to the court, that the plaintiff had departed this life, that said Northington had been appointed and qualified as his executor, that the defendant had been declared a lunatic by the probate court of Autauga, and that he had no guardian; that thereupon said Northington, as such executor, was made a party to the suit, and the cause was continued, in order that a guardian might be appointed for the defendant; and that at the next ensuing term, (Hon. NAT. COOK presiding,) as shown by the bill of exceptions, the following proceedings were had: “When the cause was regularly reached and called for trial, the plaintiff asked for a judgment by default, with a writ of inquiry; no appearance having been entered for the defendant, and no plea being filed or offered. Thereupon, Thomas H. Watts, as *amicus curiæ*, suggested to the court, that the defendant was of unsound mind at the commencement of this suit, and

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had since been declared a lunatic, by the probate court of Autauga, and had no guardian. The truth of this suggestion was not controverted. It was proved, also, that the defendant had no guardian, or committee; and that it was shown to the court, at the last term, that he had been declared a lunatic by the probate court of Autauga, and had no guardian; that the case was continued at that term, in order that a guardian might be appointed, and that no guardian had yet been appointed. On this state of facts, the court refused to give or enter any judgment for the plaintiff, or to allow him to proceed; to which the plaintiff excepted. The plaintiff then asked the court to allow him to put his case to a jury, and to prove his cause of action before the jury; and offered to prove that his cause of action was for necessities furnished by his testator to said defendant and his family, during the year 1859, which were suitable to their rank and condition in life, and were worth at least \$100, and that the defendant was about forty years old at that time. On this state of facts, the court refused to hear any part of the proof thus offered, or to allow the plaintiff to put his case before a jury, or to proceed in it, unless he would first have a guardian appointed by the probate court, and notify such guardian of the pendency of this suit, and also refused to appoint a guardian *ad litem* for the defendant; to which several rulings and decisions of the court the plaintiff excepted."

GOLDTHWAITE, RICE & SEMPLE, for the motion.—1. Upon the plainest principles of justice, necessity, and humanity, the contracts of lunatics, for necessities, or things suitable to their condition in life, will be upheld, and enforced by action at law, as if the lunatics were of sound mind. *Richardson v. Strong*, 13 Iredell, 106; *Hallett v. Oakes*, 1 Cushing, 296; *Tally v. Tally*, 2 Dev. & Batt. Eq. 387; *Brown v. Jodrell*, 14 Eng. Com. L. 196; *Chitty's Medical Jurisprudence*, 350, note z; *Baxter v. Earl of Portsmouth*, 5 Barn. & Cr. 170; *Ex parte Hastings*, 14 Vesey, 182; *Chitty on Contracts*, 134.

2. In such action, "the judgment is properly rendered against the lunatic himself."—Walker v. Clay, 21 Ala. 797. A recovery may be had, before a commission issued, or guardian of any kind appointed.—Richardson v. Strong, 13 Iredell, 106. And the necessity of this is apparent, when it is considered, that there is no law to compel any person to accept a guardianship of any kind for a lunatic.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—[June 28, 1861.]—That, an adult person, who is of unsound mind, can become liable by implied contract, for necessaries suitable to his estate and condition in life, is a proposition upheld alike by reason and authority.—Chitty on Con. 131-2; Baxter v. Earl of Portsmouth, 5 Barn. & Cr. 170; Brown v. Jodrell, 3 C. & P. 30; Chit. Med. Ju. 350; Hallett v. Oakes, 1 Cush. (Mass.) 296; Tally v. Tally, 2 Dev. & Batt. 385; Richardson v. Strong, 13 Ired. 106. And, at least, where no guardian has been appointed for such adult *non compos*, the suit must, in the nature of things, be prosecuted against *him* whose estate must pay any judgment that may be recovered.—Kernot v. Norman, 2 T. R. 390; Nutt v. Verney, 4 T. R. 120; Chit. Con. 131-2; Brown on Actions, 301; Clarke v. Dunham, 4 Denio, 262; Walker v. Clay, 21 Ala. 797.

[2.] When suit is brought against a person, not an idiot, but who is of non-sane mind, the rule seems to be universal, that he must, if an infant, be defended by guardian; and if an adult, he must be defended by an attorney, to be appointed for the purpose by the court, if necessary. There is no authority for the appointment of a guardian *ad litem*, to defend in such a case as this; and the court should not proceed with the trial, without having the defendant represented by an attorney.—Beverly's case, 4th Rep. 124; 1 Chitty's Pl. 427-8; Shelf. on Lunacy, 512; Cameron v. Pottinger, 3 Bibb, 11; Faulkner v. McClure, 18 Johns. 134; Robertson v. Lain, 19 Wend. 649; 1 Tidd's Pr. 92-3.

The circuit court did not err in refusing to appoint a guardian *ad litem* for the defendant, nor in refusing to allow the plaintiff to proceed with the proof in his cause, in the absence of counsel for the defendant. But in refusing to allow the plaintiff to proceed, "unless he would first have a guardian appointed by the probate court, and notify such guardian of the pendency of the suit," the circuit court erred. The defendant was an adult; and it was the right of the plaintiff to proceed, after having an attorney appointed for the defendant.

A rule is ordered to the judge presiding in the circuit court of Autauga county, to show cause why a *mandamus* shall not issue, to compel the appointment of an attorney for the defendant.

STERRETT'S EXECUTOR vs. KASTER.

[TRESPASS FOR INJURIES TO PERSONAL PROPERTY.]

1. *General objection to evidence.*—A general objection to evidence, a part of which is legal, may be overruled entirely.
2. *Evidence in mitigation of damages.*—On the execution of a writ of inquiry, after judgment by default, in trespass for taking personal property, the fact that the property was, at and before the levy of the execution, which constituted the trespass complained of, in the possession of the defendant in execution, is competent evidence for the defendant, in mitigation of damages, as tending to show that he acted in good faith in having the levy made.
3. *Same.*—In such case, the judgment by default estops the defendant from showing, even in mitigation of damages, that the plaintiff had not such a title as would authorize a recovery; yet he may show, in mitigation, that the plaintiff was not the owner of the property, as that fact is not necessarily inconsistent with the plaintiff's right to recover.
4. *Validity of contract with slave.*—Although the sale of any article to a slave, without the consent of the master, specifying the article, is a penal offense under the laws of this State; yet, if the contract

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has been fully executed, and the property delivered to the slave, it does not lie in the mouth of a third person, when sued by the master for a trespass to the property, to allege the illegality of the contract.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by F. K. Beck, as the executor of D. W. Sterrett, deceased, against Henry Kaster, to recover damages for the tortious taking of certain personal chattels, consisting principally of articles of household furniture. On the execution of a writ of inquiry, after judgment by default, as the bill of exceptions states, "the plaintiff proved, that the goods mentioned in the complaint were worth forty dollars; that the defendant, who had an execution against one Tucker, had said goods levied on and sold, under said execution, as the property of said Tucker, before the commencement of this suit, and that said goods brought forty dollars at said sale. The defendant then offered to prove, in mitigation of damages, that said Tucker was in the possession of said goods, at and before the levy of said execution, and, whilst thus in possession of them, claimed them as his own property. The plaintiff objected to this evidence, as illegal and irrelevant, and excepted to its admission by the court against his objection. The defendant then introduced another witness, and offered to prove by him, in mitigation of damages only, that prior to the sale of said goods under execution against said Tucker, and at the time of said levy and sale, said Tucker kept a restaurant in the town of Camden, and had said goods in his possession, using them in and about his said business, and claiming them as his own property. The plaintiff objected to the admission of this evidence, and excepted to its admission by the court against his objection. The proof showed, also, that whilst said Tucker was thus keeping said restaurant, a negro man slave, named Abb., the property of plaintiff's testator, was also in said restaurant, exercising the ordinary duties of a waiter and

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servant about such establishments. The plaintiff offered to prove, that said slave Abb, before said goods went into the possession of said Tucker, had purchased them, and paid his own money for them, and they had been delivered to him; but did not offer to prove, that said goods were purchased by said slave by and with the consent of his master, verbal or written, expressing the articles permitted to be bought, in conformity with the requisitions of the statute in such case made and provided. This evidence the court excluded from the jury, on the defendant's objection, and the plaintiff excepted."

The court charged the jury, in substance, that the defendant had a right to show, in mitigation of damages, that the plaintiff was not the owner of the goods at the time the action was brought; and that if they believed, from the evidence, that the goods were not the property of the plaintiff at the time of the levy and sale under execution, they must still find for the plaintiff, but might give him no more than nominal damages; to which charges the plaintiff excepted.

The rulings of the court on the evidence, and the charges given to the jury, are now assigned as error.

BYRD & MORGAN, for appellant.—1. A judgment by default is an admission of record, which estops the defendant from pleading to the merits, or from showing that the title to the property is not in the plaintiff.—*Ewing v. Peck & Clarke*, 17 Ala. 339; *Bryant v. Sheeley*, 5 Dana, 530; 1 *Tidd's Practice*, 562-4, and notes. The declarations of Tucker showed title in himself, and, for that reason, ought to have been excluded.—*McBride v. Thompson*, 8 Ala. 652; *Abney v. Kingsland*, 10 Ala. 355; *Darling v. Bryant*, 17 Ala. 10.

2. When property is bought by a slave, and delivered to him by the vendor, the title vests in the master, and he may recover it by suit, although his prior consent to the contract was not given. The bringing of the action shows an election by him to ratify the contract; and third persons cannot be heard to say, that the contract

was illegal on the part of the vendor.—Brandon v. P. & M. Bank, 1 Porter, 320; Trotter v. Blocker, 6 Porter, 269; Stanley v. Nelson, 28 Ala. 514; Bryant v. Sheeley, 5 Dana, 530.

WATTS, JUDGE & JACKSON, *contra*.—1. In the action of trespass, the title to the property, the right of possession, and the actual possession, may all be involved; and a judgment by default, while it estops the defendant from controverting the plaintiff's right to recover, is not an admission that he had the title to the property, nor even that he had the rightful possession: on the contrary, the extent of the plaintiff's interest is a proper subject for the consideration of the jury in determining the amount of his damages.—Sedgwick on Damages, 475, and notes.

2. The contract by which the slave acquired the goods, being prohibited by statute, was absolutely void, and vested no title in the master; and if he could impart any validity to it by his subsequent ratification, his election to ratify it ought to have been manifested while the goods were in the possession of the slave.—Stanley v. Nelson, 28 Ala. 514; Shanklin v. Johnson, 9 Ala. 271; Sully v. Beatty, 1 Bay, 258.

R. W. WALKER, J.—[Feb. 15, 1861.]—The familiar rule, that a general objection to evidence, a part of which is legal, may be overruled entirely, disposes of the first two exceptions. A part of the evidence covered by each of these exceptions was, that Tucker was in possession of the goods, at and before the levy of the execution; and this fact, as it tended to show that the defendant acted in good faith, in having the goods seized and sold as the property of Tucker, was competent evidence upon the question of damages.—Sedgwick Dam. 528-9.

[3.] After a judgment by default, the defendant has not the legal right to plead to the merits of the action. Ewing v. Peck & Clarke, 17 Ala. 389. But, in actions sounding in damages, after judgment by default, writs of inquiry are necessary to ascertain the amount of injury

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done; and upon the execution of these writs, matters in mitigation on the one hand, and of aggravation on the other, become the very gist of the inquiry. It is doubtless true, that it is not competent for the defendant, after judgment by default, to show, even in mitigation of damages, a state of facts which is inconsistent with the plaintiff's right to recover at all, or which would have been a good plea in bar of the action; as for example, in the action of trespass, that the plaintiff had, at the time of the taking or injury, neither the possession, nor the right to the possession of the goods.—*Garrard v. Dollar*, 4 Jones' L. (N. C.) 175; *Long v. Wortham*, 4 Texas, 381. But evidence showing that the plaintiff was not the owner of the goods, is not necessarily inconsistent with the fact, that he had either the possession, or the right to the possession, (which is all the title necessary to support the action;) and, as the extent of the injury sustained by the plaintiff may depend, very materially, upon the extent of his interest in the property, evidence that he was not the owner is, on the one hand, admissible for the defendant; and evidence that he was the owner is, on the other, admissible for the plaintiff. The admission of evidence that the plaintiff was not the owner, does not impair the effect of the judgment by default, as an estoppel upon the question of his possessory right, but simply serves to disclose the extent of the injury inflicted upon him; for he who has a bare possessory right, is not entitled to the same measure of damages, as he who has the absolute property.—*Sedgwick Dam.* 482-3, 530; *Brierly v. Kendall*, 10 Eng. L. & Eq. 819; *Jones v. Lowell*, 85 Maine, 538; *Compton v. Martin*, 5 Rich. L. 14.

[4.] A slave cannot be the owner of property: all his acquisitions, whether by gift, or by the earnings of his labor, belong to his master. It is true that, under our laws, the sale of any article to a slave, without the consent of the master, specifying the article, is a penal offense. But, where the contract has been fully executed, and the property delivered to the slave, it is clear that, as respects third persons, the property becomes at once the

property of the master; and no subsequent act or contract of the slave, without the master's express or implied consent, can divest the latter of his title. It does not lie in the mouth of a third person, who, without such consent of the master, purchases, or takes possession of, property which has been sold and delivered to a slave, to say that the slave got possession of the property by a contract which the law declares illegal as to the seller.—*Bryant v. Sheeley*, 5 Dana, 530; *Brandon v. Huntsville Bank*, 1 Stew. 320; *Gregg v. Thompson*, 2 So. Ca. Conat. Ct. R. 332; *Gist v. Toohey*, 2 Rich. L. 425; *Cobb on Slavery*, §§ 258, 261-4, 268. It follows, that the court erred, in rejecting the evidence which was offered, to show that the goods had been purchased and paid for by the slave Abb.

What we have said will furnish a sufficient guide to the court below, on another trial, as to the other questions presented by the record.

For the error pointed out, the judgment must be reversed, and the cause remanded.

BROOKS vs. RUFF.

[TROVER FOR CONVERSION OF HORSE.]

1. *Extinguishment and subsequent assignment of mortgage.*—Where the condition of a mortgage is, that the mortgagor shall save harmless the mortgagee against liability as his surety on a note due to a third person, the condition is performed, when the mortgagor procures the cancellation of the note, and the substitution of a new note in its stead, with a different surety; and the mortgage being thereby extinguished, it cannot then be assigned to the surety on the new note, for his indemnification, even though the assignment be made with the assent of the mortgagor, for valuable consideration contemporaneously with the cancellation and substitution of the notes.

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2. *Parol mortgage.*—A mortgage of personal property, given to indemnify the mortgagee against liability on a note as surety for the mortgagor, being afterwards extinguished by the cancellation of the note, and the substitution of a new note in its stead, with a different surety; a verbal agreement between the mortgagor, the mortgagee, and the surety on the new note, made contemporaneously with the cancellation and substitution of the notes, to the effect that the mortgage shall stand as a security for the surety, constitutes a valid mortgage as between the parties.

APPEAL from the Circuit Court of Lowndes.

Tried before the Hon. NAT. COOK.

THIS action was brought by Ransom C. Ruff, against Andrew J. Brooks, to recover damages for the conversion of a horse; and was commenced on the 2d September, 1858. The plaintiff claimed the horse under a mortgage from one S. P. Brownlie, and the defendant held him under a purchase from said Brownlie. It appeared that Brownlie, in April, 1855, executed a mortgage on the horse, with other property, to one Samuel Ivey; the condition of which was, that he should "save the said Ivey harmless" against liability on a promissory note for \$500, payable to Randall Cheek, and due the 1st January, 1856, which said Ivey had signed as the surety of said Brownlie; and this mortgage was duly proved and recorded. Ivey became uneasy about his liability on the note, and sent an agent to Brownlie, proposing to make some new arrangement about the matter. Brownlie offered to let him have a negro woman and child, at the price of \$1250, which Ivey was willing to give; but the title to the negroes was in Ruff, the plaintiff, who was not willing to let Ivey have them at that price, but said that he preferred to take them himself. Ivey then insisting that he should be released from liability on the debt to Cheek, "it was agreed among them, that Ivey should be released, that Ruff should become bound to Cheek for the debt, and that Ivey should assign the mortgage to Ruff. Brownlie, Ivey and Ruff assented to this; and Cheek being willing to take Ruff instead of Ivey, the papers were executed in pursuance of this agreement." Ivey's

note to Cheek was then delivered up to him; a bill of exchange, in lieu of it, was drawn by Ruff, and endorsed by Brownlie; and Ivey endorsed on the mortgage an assignment in the following words: "For value received, I hereby transfer this mortgage, with all the rights which it secures to me as S. P. Brownlie's security, as therein specified, to Ransom C. Ruff, of said county and State. In witness whereof," &c. These transactions were had on the 5th January, 1856, as shown by the date of the assignment. The record does not state any of the facts connected with the defendant's purchase of the horse. The bill of exchange was paid at maturity, by Ruff.

"The court charged the jury, that if they believed, from the evidence, that Ivey, the mortgagee, assigned the mortgage to plaintiff, with the assent of Brownlie, and because plaintiff had agreed to become bound to Cheek in the place of Ivey, and that he did become so bound, then the consideration for the assignment of the mortgage was good and valid, and the assignment passed to plaintiff all the rights and equities of Ivey; and if they further believed, from the evidence, that plaintiff afterwards paid the debt to Cheek, then, so soon as he did this, he had a right to the possession of the horse mortgaged; and that if the proof showed that plaintiff had paid Cheek before suit brought, and that the defendant had the horse in his possession after this payment, and refused to deliver him, the plaintiff was entitled to recover." This charge, to which the defendant excepted, is now assigned as error.

CLEMENTS & WILLIAMSON, for the appellant.—The cancellation of the note on which Ivey was bound, and the substitution of the bill of exchange by Ruff, extinguished the mortgage; and Ivey's assignment thereof, even if founded on valuable consideration, passed no interest to plaintiff.—*Bouham v. Galloway*, 18 Ill. 68; *Abbott v. Upton*, 19 Pick. 484; *Mead v. York*, 2 Selden, 451; *Sumner v. Bachelder*, 30 Maine, 35.

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THOS. WILLIAMS, *contra*.—The assignment of the mortgage was contemporaneous with the cancellation of the note and the substitution of the bill of exchange, and was for valuable consideration; and the mortgagor was a party to the agreement. All the elements of a valid contract are shown; and the defendant is not in a position to impeach it, as he does not show how or when his rights accrued.

A. J. WALKER, C. J.—[Feb. 11, 1861.]-The mortgage in this case was an assignment, upon a specified condition; and upon the performance of the condition, the mortgage was extinguished, and the title reverted in the mortgagor. This proposition necessarily results from the fact, that the mortgage is but a security for the discharge of a particular debt or duty; and it is well recognized in the law-books.—1 Hilliard on Mort. 447; Gunn v. Young, 2 St. & P. 160; Deshaza v. Lewis, 5 St. & P. 91. The condition of the mortgage was, to save harmless the surety of the mortgagor. This the mortgagor unquestionably did, when he obtained a cancellation of the note, upon which the mortgagee was his surety, and substituted a bill of exchange, with a different surety, and obtained a discharge of the mortgagee. The mortgage was thus extinguished; and being extinguished, the assignment of it could not resuscitate it, although the assignment might be upon a valuable consideration. The cases of Bonham v. Galloway, (13 Ill. 68,) Mead v. York, (2 Selden, 449,) Abbott v. Upton, (19 Pick. 434,) cited upon the brief of appellant's counsel, conclusively support that position.—See, also, 1 Hilliard on Mort. 461-2; Sumner v. Bachelder, 30 Maine, 35. Even the consent of the mortgagor, that the mortgage should be assigned, could not, of itself, revive it. The charge given by the court was erroneous, because it predicated the plaintiff's right of recovery upon the assignment, for a valuable consideration, of an extinguished mortgage, with the consent of the mortgagor.

[2.] We see no reason why a mortgage of personalty,

valid *inter partes*, may not be made by verbal contract.— 2 Hilliard on Mort. 520; Morrow v. Turney, 35 Ala. 136. Such a mortgage would, by virtue of our registration statute, be void "as to purchasers for a valuable consideration, mortgagees, and judgment creditors without notice," (Code, § 1288;) but we think it would be valid as to the parties, and others not protected by that statute. The evidence conduces to show, that there was a verbal agreement, that the mortgage should stand as a security to the plaintiff. This agreement, if it existed, would amount to a verbal mortgage in favor of the plaintiff, and would avail against the defendant, unless he could show that he was one of the persons protected by the registration law, or unless his interest accrued before the making of the verbal mortgage. The evidence does not show that the defendant is one of those persons.

What we have already said will, probably, be sufficient to guide the court upon a future trial, and we need not consider farther the questions presented.

Reversed and remanded.

WARD vs. NEAL.

[ACTION FOR DAMAGES FOR OBSTRUCTION OF ANCIENT LIGHTS.]

1. *Easement founded on adverse enjoyment.*—The English doctrine, that a right to have ancient windows unobstructed can arise from mere uninterrupted enjoyment for the period prescribed by the statute of limitations as a bar to actions for the recovery of land, does not prevail in this country.

APPEAL from the Circuit Court of Madison.

Tried before the Hon S. D. HALE.

THIS case was before this court, at its January term, 1860, on appeal from the judgment of the circuit court

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sustaining a demurter to the complaint; and the judgment of the circuit court was then reversed, and the cause remanded.—See 35 Ala. 602. The action was brought by Joseph Ward, against George W. Neal, to recover damages for an obstruction of the plaintiff's ancient windows; and a trial was had, after the reversal, on the plea of not guilty, and the following agreed facts: "Plaintiff has title to, and is possessed of, a certain house and lot in the town of Huntsville; and he and defendant are adjacent proprietors. Plaintiff's said house has been built, and situated as it was at the time of the injury complained of, for twenty years; and during all that time the light and air had passed through said windows into his house. His possession has been quiet, exclusive, and undisturbed. The fence between the lots of plaintiff and defendant was built, upon a line which had been agreed upon by preceding proprietors, about the year 1836 or 1838, and was situated five or six feet from plaintiff's house, and about eighty feet from defendant's house; and, during all that time, had been a common plank fence, six feet six inches high, made of boards nailed upright, at an interval of one inch between them. The old line, prior to this compromise line, ran farther from plaintiff's house. The distance from the ground, to the top of the windows in plaintiff's house, is ten feet ten inches; and from the ground to the bottom of the windows, five feet five inches. About the 15th September, 1856, the defendant erected a close battery of weather boarded planks against said fence, but on his own side of it, about fourteen feet high, which excluded the light and air from plaintiff's said windows. This action was commenced on the 23d January, 1858. If, on these facts, the plaintiff is entitled to recover, the damage shall be assessed at \$25." On these facts, the court charged the jury, that the plaintiff was not entitled to recover; to which charge the plaintiff excepted, and he now assigns the same as error.

PHELAN & PHELAN, for appellant.

WALKER & BRICKELL, *contra*.

STONE, J.—[July 11, 1861.]—The present suit is for obstructing ancient lights; and the plaintiff founds his right of recovery, not upon grant, but upon his uninterrupted user of the easement for a period which would bar a recovery in ejectment against a trespasser. He makes no other proof than uninterrupted enjoyment. Will this, without more, ripen into a title by prescription? Under the English decisions, it would; but, in the American States, the English doctrine has not been adopted, save by a few of the States.

Speaking of the English doctrine, the supreme court of New York, in *Parker v. Foote*, (19 Wendell, 317,) said: "The learned judges who have laid down this doctrine, have not told us upon what principle or analogy in the law it can be maintained. They tell us, that a man may build at the extremity of his own land, and that he may lawfully have windows, looking out upon the lands of his neighbor.—2 Barn. & Cress. 686; 8 *ib.* 332. The reason why he may lawfully have such windows, must be, because he does his neighbor no wrong; and, indeed, so it is adjudged, as we have already seen; and yet, some how or other, by the exercise of a lawful right, in his own land, for twenty years, he acquires a beneficial interest in the land of his neighbor. The original proprietor is still seized of the fee, with the privilege of paying taxes and assessments; but the right to build on the land, without which village or city lots are of little or no value, has been destroyed by a lawful window. How much land can thus be rendered useless to the owner, remains yet to be settled. Now, what is the acquiescence which concludes the owner? No one has trespassed upon his land, or done him a legal injury of any kind. He has submitted to nothing but the exercise of a lawful right on the part of his neighbor. How, then, has he forfeited the beneficial interest in his property? He has neglected to incur the expense of building a wall twenty or fifty feet high, as the case may be—not for his own benefit, but for the sole purpose of annoying his neighbor. That was his only remedy. A wanton act of this kind, although

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done in one's own land, is calculated to render a man odious." And the court ruled in that case, that the English doctrine was not applicable to our country, and refused to adopt it. To the same effect are *Napierv. Bulwinkle*, 5 Rich. Law, 322; *Cherry v. Stein*, 11 Md. 22-8; *Ingraham v. Hutchinson*, 2 Conn. 597. See, also, *Criswell v. Clugh*, 3 Watts, 330; and the authorities cited in this case when formerly here—35 Ala. 602.

That the length of time during which the plaintiff has enjoyed his windows, is sufficient to perfect his right, if there had been in that enjoyment the properties necessary to constitute an adverse holding, is settled in this State. *Stein v. Burden*, 24 Ala. 130; *Roundtree v. Brantley*, 34 Ala. 544; *Polly v. McCall*, June Term, 1860.

We fully concur in, and adopt the doctrine declared by the supreme court of New York, *supra*.

Judgment affirmed.

BAKER, FRY & CO. vs. INGERSOLL.

[SCIRE FACIAS ON JUDGMENT.]

1. *Parties to sci. fa.*—On the death of the nominal plaintiff in a judgment, a *scire facias* to revive it must be prosecuted in the name of his personal representative, and cannot properly be issued in the name of the beneficial plaintiff alone, nor in the name of the deceased nominal plaintiff.

APPEAL from the Circuit Court of Russell.

Tried before the Hon. NAT. COOK.

In this case, Allen Matthews, suing for the use of Baker, Fry & Co., recovered a judgment against Stephen M. Ingersoll, in the circuit court of Russell, on the 14th October, 1889. Executions were issued on this judgment

on the 29th November, 1839, and on the 15th January, 1841; and on the 26th February, 1857, a *scire facias* to revive it was sued out in the name of said Matthews. By consent of parties, the *scire facias* was allowed to stand in lieu of a declaration. The defendant pleaded, among other things, that Allen Matthews, the nominal plaintiff, was dead when the *scire facias* was sued out; to which plea the plaintiffs demurred. The court overruled the demurrer, and charged the jury, that, if said Matthews was dead when the *scire facias* was sued out, they must find for the defendant. The plaintiffs excepted to these rulings of the court, and they now assign the same as error.

D. CLOPTON, with CHILTON & YANCEY, for appellants, cited the following authorities: 2 Tidd's Pr. 1095; Bates v. Terrell, 7 Ala. 129; Miller v. Shackelford, 16 Ala. 98; Stewart v. Cunningham, 22 Ala. 628; Smith v. Harrison, 33 Ala. 709.

GEO. D. HOOPER, *contra*, cited Jelks v. Edwards, 6 Ala. 143; Tait v. Frow, 8 Ala. 543; Gray v. Turner, 8 Ala. 30; Duncan v. Hargrove, 22 Ala. 160; 4 Com. Digest, 239; 1 Rolle's Abr. 900.

R. W. WALKER, J.—[July 11, 1861.]—The *scire facias*, following in this respect the original judgment, was sued out in the name of Allen Matthews, for the use of Baker, Fry & Co. Matthews, the nominal plaintiff, died after the rendition of the original judgment, and before the issuance of the *scire facias*; and the question now presented is, whether this fact is a bar to the proceeding, or whether, on the suggestion of the death of the nominal plaintiff, the *scire facias* could proceed in the name of the beneficiaries.

The Code provides, that "when suit is brought, for the use of another, the death of the nominal plaintiff does not abate the suit, but it proceeds in the name of the beneficiary."—Code, § 2147. This statute renders un-

necessary the revival of the action, where the nominal plaintiff dies during its pendency; but, where the person who has the legal interest in the cause of action dies, there is nothing in this law which authorizes the subsequent institution of a suit in the name of such person, for the use of the party having the beneficial interest. Such a case is unaffected by statute in this State, and the personal representative must, as at common law, be the actor of record. And where suit is brought in the name of one person, for the use of another, the defendant may plead, either in bar or abatement, that the nominal plaintiff was dead at the commencement of the suit.—*Jelks v. Edwards*, 6 Ala. 143; *Tait v. Frow*, 8 Ala. 543.

A *scire facias* on a judgment is sometimes, for some purposes, regarded, not as a new action, but as a mere continuation of the original suit. Thus, it must issue out of the court in which the judgment was rendered; matter which might have been pleaded in defense of the original action, cannot be pleaded in defense of the *scire facias*; and no new judgment for debt or damages can be rendered on the *scire facias*, but the old one is simply called into action by a judgment that the plaintiff have execution.—*Murray v. Baker*, 5 B. Mon. 572; *Norton v. Beaver*, 5 Ohio, 178. In other respects, however, the proceeding by *scire facias* must be regarded as a new suit. Thus, the defendant may plead to it matters subsequent to the rendition of the judgment sought to be revived; and as respects the parties to the proceeding, it is in the nature of an action upon the judgment, and governed by the rules applicable to ordinary suits upon judgments. Consequently, a *scire facias* can only be maintained in the name of him who has the legal title to the judgment; that is, in the name of the original plaintiff, or, after his death, of his personal representative.—See *Duncan v. Hargrove*, 22 Ala. 160; *Hanson v. Jacks*, *ib.* 550; *Pickett v. Pickett*, 1 How. Miss. 267; *McAfee v. Patterson*, 2 Sm. & M. 595; *Gonnigal v. Smith*, 6 Johns. 106; *Crary v. Turner*, *ib.* 53 (note a); *Forbes v. Tiffany*, 4 Inda. 204; *Ensworth v. Davenport*, 9 Conn. 390; *Smith v. Harrison*,

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33 Ala. 709. It follows, that on the death of the, nominal plaintiff in a judgment, a *scire facias quare executionem non*, must, like an original suit on the judgment, be conducted in the name of his personal representative, and cannot properly be issued, either in the name of the original parties to the judgment, or of the beneficiary alone.

Judgment affirmed.

COX, BRAINARD & CO. vs. FOSCUE.

[ACTION AGAINST OWNERS OF STEAMBOAT FOR NEGLIGENCE.]

1. *Liability of steamboatmen, as common carriers, in matter of transshipment of freight.*—A transshipment of freight is only justifiable in cases of necessity, and, if made in the absence of such necessity as constitutes a legal excuse, subjects the carrier to liability for the subsequent loss of the freight on the vessel to which it is transferred; and the mere grounding of a steamboat on an inland river, from which she could relieve herself, with safety and convenience, by temporarily placing a part of her cargo on the bank, and afterwards take it on board again and finish her voyage, does not constitute such legal excuse.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by F. F. Foscue, against the appellants, as common carriers, to recover damages for the loss of two bales of cotton, which were shipped by the plaintiff on board the defendants' steamboat *Eliza Battle*, consigned to Goode & Ulrick at Mobile, and which were never delivered. The case was before this court at its January term, 1859, when the judgment of the city court was reversed, and the cause remanded.—See the report in 33 Ala. 713. On the second trial, as appears from the record, the defendants pleaded the general issue, and a

special plea averring, in substance, that the cotton was lost by "the dangers of the river and of fire," within the meaning of the exception contained in the bill of lading; and issue was joined on each of these pleas. It appeared from the evidence adduced on the trial, that the plaintiff's cotton was shipped on board of the defendants' boat, *Eliza Battle*, at Pace's landing on the Tombeckbe river, on the 20th November, 1855; that the bill of lading contained the usual exception as to "dangers of the river and fire;" that the *Eliza Battle*, while on her voyage down the river, ran aground on Croom's bar, and, in order to lighten her, a part of her cargo, including the plaintiff's cotton, was transferred to the *Jenny Bealle*, another boat belonging to the defendants, which passed while the *Eliza Battle* was on the bar; that the *Eliza Battle*, after being thus lightened, continued her voyage down the river, without taking back any part of her cargo from the *Jenny Bealle*; that the latter boat afterwards ran aground, and was lightened, in like manner, by transferring a part of her cargo to the *Sallie Spann*, another boat belonging to the defendants; and that the *Sallie Spann*, with all her cargo, including the plaintiff's cotton, was afterwards destroyed by accidental fire. Each one of the boats was shown to have had skillful and competent officers and a sufficient crew, and not to have been overloaded; and no question of negligence arose in the case. One of the plaintiff's witnesses, who was a passenger on the *Eliza Battle*, testified as follows: "The river was low, and falling slowly. I saw no danger to the boat, as she lay on the bar, and heard nothing said by her officers as to any danger, except danger of delay, or of inability to continue her voyage. The boat was so near the bank at one end, that she could have put out her gangways, and rolled off her cotton on the bank. I do not know what constitutes a necessity to tranship, nor do I know whether the boat could have gotten off; but the cotton could have been landed on the bank, by putting out planks from the boat."

"The court charged the jury as follows: 'If the *Eliza*

Battle was compelled to tranship the cotton, by or through the negligence or want of skill of those who had the management and control of her; the defendants are liable. But, if there was no negligence, or want of skill, on the part of those who had the management and control of the *Battle*, then you will ascertain, whether or not she was in such a condition that, in order to avoid an impending serious danger or loss to the boat and cargo, it was necessary to tranship the cargo, or a part of it, and there was no other reasonable way of lightening her in the power of the captain with his crew, by which said lightening could have been effected, at less risk to the plaintiff than was occasioned by such transshipment. In case of grounding, if the grounding was by reason of any negligence of the defendants, they would be responsible for all the consequences of the transshipment and loss, if accruing by reason of the transshipment. If the grounding was not by negligence, then, if it became necessary to lighten the boat in order to get her off, their first duty would be to land the cotton, if that would have enabled the boat to proceed, and it was practicable to do so with safety, and take it on again after the boat was freed from the grounding, and in a proper condition to proceed on her voyage. If this could not be conveniently done, then it was proper to put the cotton on another boat, in order to lighten the *Battle*, if the captain, acting with the judgment that a wise and prudent man would exercise as the most conducive to the benefit of all concerned, came to the conclusion that such transshipment should be made. If you are satisfied that there was such a state of facts, and the transshipment was proper, the defendants are entitled to a verdict; if it was not, the plaintiff is entitled to a verdict."

The court also charged the jury, at the request of the plaintiff, "that the right of transshipment at the plaintiff's risk did not exist, unless it was necessary to avoid an impending serious damage or loss to the boat and cargo, and there was no other reasonable way of lightening the boat in the power of the captain with his crew,

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by which such lightening could have been effected, at less risk to the plaintiff than was occasioned to him by such transshipment."

The defendants excepted to each of these charges, and they now assign them as error.

GEO. N. STEWART, and E. S. DARGAN, for appellants.—The court below, in its instructions to the jury, sanctioned the transshipment only as a last resort—required the captain first to exhaust every other possible mode of lightening the boat; and made it his first duty, to land the cotton on the bank and take it back again, if that could be done at less risk to the plaintiff than was incurred by the transshipment. In each of these particulars, it is insisted, the instructions are erroneous. It is the first duty of a carrier, to forward the goods entrusted to him to their place of destination, if his own vessel becomes disabled. The master of the vessel is the agent and representative, not of the plaintiff or defendant alone, but of all the parties interested in the ship and cargo—owners, shippers, and underwriters; and it is his duty to consult the interests of all equally. If he, exercising his best judgment and professional skill, and acting for the best interests of all parties concerned, determined that the accident rendered the transshipment necessary or proper, he was authorized to make it, and the defendants thereby incurred no liability for the subsequent loss of goods.—Parsons' Mar. Law, 162-3, and notes; Abbott on Shipping, 448, 453-4, 240, 236, 249, note 1; Flanders on Shipping, 257-8, 240, 254, 171, 173; 8 Kent's Com. (5th ed.) 210, 212, 224; 1 Story's R. 342; 4 Johns. Ch. 218; 9 Mass. 551; 9 Ad. & El. 382; Parsons' Mercantile Law, 348-9.

WM. BOYLES, and R. H. & J. L. SMITH, *contra*.—A transshipment of freight is only justifiable in cases of necessity. The mere stranding or grounding of the vessel does not constitute a case of necessity, if she can be got off and repaired at an expense not exceeding one-half her

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value.—Abbott on Shipping, 451; Bryant v. Com. Ins. Co., 6 Pick. 141; 3 Story, 465; 10 Barr, 114; 1 Arnould on Ins. 181; Flanders on Maritime Law, §§ 135, 137; Am. Law Reg. for June, 1857, p. 459; 8 Watts & S. 44; 1 B. Monroe, 339; 6 Ohio, 359; 8 Missouri, 99; 9 Ad. & El. 314.

A. J. WALKER, C. J.—[July 1, 1861.]—The contract of affreightment obliges the carrier, in the absence of a legal excuse, to carry the freight to the destined port in the very vessel stipulated in the bill of lading. It is a right resulting from the contract, that the transportation shall be in the chosen vessel. It is not permissible to speculate as to the reasonableness of the choice. The owner of the freight cannot be questioned as to his reasons. The law allows to him the benefit of the maxim, "*Hoc volo, sic jubeo, sit pro ratione voluntas.*"—Bazin v. Liverpool & Am. Steamship Co., Am. Law Register for June, 1857, p. 459, opinion by Judge Grier; Garnett v. Willan & Jones, 5 Barn. & Ald. 53-61; Little & Tompkins v. Sample, 8 Mo. 99. A transshipment of the freight, without a legal excuse, however competent, and safe the vessel into which the transfer is made, is a violation of the contract, an infringement of the rights of the freighter, and subjects the carrier to liability, if the freight be lost. The transshipment, therefore, of the plaintiff's cotton, of itself rendered the carrier liable for the subsequent loss of the cotton, unless the act of transshipment was legally proper or excusable.

The first charge given by the court announced the proposition, that the transshipment was not rendered proper by the grounding of the boat, if, by placing the cotton on board upon the bank, the boat would have been freed from the grounding, and could afterwards have taken on the cotton, and proceeded on her voyage, and these things could have been done with safety and convenience. The precise question to which this charge gives rise is, whether a grounded steamboat, upon one of our interior rivers, is justified in transshipping a part of her cargo, when she

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could with safety and convenience relieve herself, by placing it upon the bank, and then take it on and prosecute her voyage to the port of destination. The rule of maritime law is not, that the master of a vessel may at his election, or even when he deems it most politic, tranship. The privilege of transhipment is one of necessity. Judge Story says, the master "is not at liberty to transport the goods in any other vessel in the course of the voyage, *except from mere necessity*, when his own ship becomes incapable, by inevitable casualty, from performing it."—Story on Bailments, 564, § 562. Chancellor Kent states the same principle in the following language: "In cases of necessity, as where the ship is wrecked, or otherwise disabled in the course of the voyage, and cannot be repaired, or cannot, under the circumstances, be repaired without too great delay and expense, the master may procure any other competent vessel to carry on the cargo and save his freight."—Kent's Com. m. p. 210. And Angell, in his work on Carriers, in reference to the same subject, says, that if by reason of stranding, or some other unexpected cause, *it becomes impossible to convey the cargo safely to its destination in his own vessel*, the master is to do what a prudent man would think most for the benefit of all concerned; and transhipment to the place of destination is the first object, because that is the furtherance of the original object.—Angell on the Law of Carriers, 188, § 187. See, also, Smith's Mercantile Law, 292; 1 Parsons' Mar. Law, 163, 161, n. 2; Abbott on Shipping, m, p. 365; Searle v. Scovel, 4 Johns. Ch. R. 222; Shipton v. Thornton, 9 Ad. & El. 333; Crawford v. Williams, 1 Sneed, 212; 1 Arnould on Ins. 181, top; Jordan v. Warren Ins. Co., 1 Story, 354; Parsons' Mer. Law, 348-9.

It may be that the necessity, which would justify a transhipment, is not required to be shown with absolute certainty to have existed. That a *moral necessity* would be sufficient to justify the transhipment, seems to be conceded by the authorities. Such a case of moral necessity would exist, where the circumstances were such, that

a master of reasonable prudence and discretion, acting upon the pressure of the occasion, would have made the transshipment, from a firm opinion that, unless the transshipment was made, the vessel could not be delivered from the peril at all, or not without the hazard of an expense utterly disproportionate to her real value.—Brig Sarah Ann, 2 Sumner, 207; Gordon v. Mass. Ma. & Fire Ins. Co., 2 Pick. 240; Ship Fortitude, 2 Sum. 248; Flanders on Maritime Law, 104, n. 2; 1 Parsons on Maritime Law, 60; Parsons' Mer. Law, 376, n. 2. A case of such moral necessity is put by Lord Tenterden, as follows: "If on the high seas the ship be in imminent danger of sinking, and another ship, apparently of sufficient ability, be passing by, the master may remove the cargo into such ship; and although his own ship happen to outlive the storm, and the other perish with the cargo, he will not be answerable for the loss."—Abbott on Shipping, m. p. 365. But no such case of moral necessity is presented in the facts upon which the court below, in the charge which we are considering, instructed the jury, that the transshipment of the plaintiff's cotton was not justified.

In the case of Bryant v. Com. Ins. Co., (6 Pick. 141,) the court sustain the view which we take of the master's duty in this case, in the following language: "The law authorizes the master, in case of shipwreck, stranding, or other disasters, which may happen without his fault, to act for all parties interested in their absence. If the ship should be stranded, it would be his duty, in behalf of the owner of the ship, to get her off and prosecute the voyage, if it could be done at an expense not exceeding half her value. So, if that could not be done, he has authority to procure another ship to carry the cargo to the port of destination. If the cargo were damaged by the stranding, not exceeding one-half of the invoice value, it would be the duty of the master, as representing the owner of it, to cause it to be reloaded on board of the ship, if that were in a condition to transport it, or, if not, on board any other ship which he could procure upon reasonable terms on account of the ship-owner; to the end that the ship-owner may earn his freight, and the

merchant may have his goods at the port of destination. The master, in short, is, in such cases, to act reasonably and honestly, with a view to save the property and perform the voyage." The mere stranding, of itself, does not necessarily produce a necessity for transshipment. Notwithstanding the stranding, it is the master's duty to get the vessel off, and prosecute the voyage, if he can do so; and no consideration of mere convenience to him would justify a transshipment.

We do not think the charge given at the instance of the appellee is obnoxious to the objection made especially to it. The objection is, that it makes the transshipment improper, unless there was no other *reasonable* way of lightening the boat in the power of the captain, at less risk to the plaintiff than was occasioned by the transshipment; and that the jury were thus made to consider the interest of the plaintiff alone, and not of the boat-owner and all others concerned, in determining whether the transshipment was proper. We do not think the charge is obnoxious to the objection. A way of lightening the boat, which would protect the plaintiff at the expense of all others concerned, would be unreasonable; and the use of the word *reasonable* in the charge shows, that the court did not intend to make the impropriety of the transshipment depend upon the fact, that there was another way of lightening the boat, which would produce less risk to the plaintiff, but which would involve a disregard of the interest of all others concerned. If the charge is confused, and tended to mislead the jury, the appellants ought to have protected themselves by asking an explanation at the time. What we have already said in passing upon the first charge, will meet the other objections made to the second.

Judgment affirmed.

STONE, J., does not assent to the correctness of the criticism of the last charge given.

PATTERSON vs. FLANAGAN.

[TROVER FOR CONVERSION OF SLAVE.]

1. *Husband's rights in wife's statutory separate estate.*—Under the Code, (§ 1983,) the husband has no right or power to mortgage, for his own individual debt, a slave belonging to the wife's statutory separate estate.
2. *Declarations explanatory of possession, and against interest.*—Declarations, made by a person who has the possession of a slave, to the effect that he holds under a will, and claims only a life-estate in the slave, are competent evidence on the principle of *res gesta*, and as admissions against interest, without the production of the will.
3. *Relevancy of evidence, in trover, showing time of slave's death.*—In trover by the wife, after the death of the husband, for the conversion of a slave belonging to her statutory separate estate, which went into the defendant's possession under a mortgage executed by the husband without authority of law, and was accidentally drowned while thus in his possession, it is wholly immaterial whether the death of the slave occurred before or after the death of the husband; consequently, the exclusion of evidence bearing on that question is not a matter available on error.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. NAT. COOK.

THIS action was brought by Mrs. Eliza E. Flanagan, against D. A. W. Patterson, and was commenced on the 21st September, 1858. The complaint, as amended, contained two counts; the first being in the usual form of a count in trover for the conversion of a slave, named Ellen, the property of the plaintiff; and the second claiming fifteen hundred dollars damages for the defendant's negligence and want of proper care and attention towards the slave, while in his possession under a contract of hiring. No pleas appear in the record. The slave in controversy, as appeared from the evidence adduced on the trial, had belonged to the plaintiff's paternal grand-

father, who bequeathed her to the plaintiff's father for life, with remainder to the plaintiff. The plaintiff was married, in October, 1853, to James M. Flanagan, who died on the 11th May, 1857; and she owned and possessed said slave at the time of her marriage. The defendant obtained the possession of the slave, in the early part of the year 1857, under a mortgage from said Flanagan, to secure the re-payment of a sum of money lent by him to said Flanagan; and she was accidentally drowned, while thus in his possession, in attempting to walk across a foot-log over a creek, on returning with other negroes from the field in which they worked. The exact time of the slave's death—whether it occurred before or after the 11th May, 1857, when said Flanagan died—was not shown. The defendant's overseer, the only witness who testified to the circumstances attending her death, could not state the precise time at which it occurred; and the court excluded all the evidence offered by the defendant, for the purpose of showing that it occurred before the 11th May. This evidence consisted of the report of the slave's death in the town of Camden, which was about one mile distant from the defendant's plantation; the statement of a witness, who lived in Camden, that he had heard of the slave's death before Flanagan died; and a copy of a newspaper published in Camden, dated the 9th May, which contained an account of the slave's death on the 6th May. The defendant reserved several exceptions to the exclusion of this evidence.

On cross-examination of one Harwood, a witness for plaintiff, "defendant asked said witness, whether plaintiff's father had the possession of said slave in his lifetime, and claimed her as his own property; to which the witness answered affirmatively, and stated, in reply to other questions, that said slave was delivered to plaintiff by her father's administrator, about three months after his death, and that he died intestate. Plaintiff asked said witness, on the rebutting examination, how plaintiff's father claimed to own said slave; and the witness answered, that he claimed to own her for his life only.

The defendant then asked the witness, whether the life-estate was so claimed by plaintiff's father under a deed or will; and he answered, that it was under a will. Thereupon, the defendant objected to the proof made by the witness, (that he only claimed a life-estate in the slave,) unless the will was produced. The court overruled the objection, and permitted the evidence to remain before the jury; and the defendant excepted."

The plaintiff proved, by several witnesses, declarations made, at different times, by the defendant and the plaintiff's deceased husband, as to the terms of the contract under which the defendant obtained the possession of the slave; the substance of these declarations being, that Flanagan mortgaged the slave to the defendant, to secure the re-payment of a sum of money lent to him by the defendant. She also read in evidence a portion of the defendant's answers to interrogatories filed to him under the statute, in another suit between them, (in which she sued for the conversion of another slave, named Frank,) in the following words: "The boy Frank was put in my possession by James M. Flanagan, in 1857, for the purpose of securing the payment of \$750 paid by me for him; and the understanding between us was, that if the said money was not paid to me by some time in December, 1857, (the time not now remembered,) I was to sell Frank, and another negro put in my possession by said Flanagan, and pay myself the amount."

"After having charged the jury, without objection, as to the facts necessary to make said slave the separate estate of the plaintiff under the Code of Alabama, the court further charged the jury as follows: That if they found from the evidence, under the previous charge of the court, that said slave was the separate estate of the plaintiff, held by her under the Code of Alabama, then her husband had no right to mortgage said slave, without her knowledge or assent, to secure a debt of his own; and that if he did so mortgage said slave to the defendant, and the defendant took possession of her under the mortgage, his possession so held would be unlawful as to

the plaintiff; and that if the slave was drowned while so held by the defendant, the defendant would be liable to the plaintiff for her value, and the mortgage of the husband, if given as aforesaid, would not protect him."

The defendant excepted to this charge, and requested the court to give four charges in writing; the first and third of which the court gave, but refused the others; and the defendant excepted to their refusal. The charges so refused were in the following words:

"2. If the jury find, from the evidence, that the plaintiff was the wife of James M. Flanagan in the early part of the year 1857, and had a separate estate in the slave Ellen, held by her under the provisions of the Code of Alabama, as defined in the charge given by the court; and that said Flanagan placed said slaves in the possession of the defendant, under a contract that he was to have the use of the slaves for the interest on the money loaned by him to said Flanagan, until the then next December, and then was to have authority to sell them, if the money was not paid,—then the defendant's possession of the slave would be lawful up to December, 1857."

"4. If the jury believe, from the evidence, that the slave Ellen went into the defendant's possession, under a contract that she was to remain in his possession, as a security for money which James M. Flanagan owed him, until December, 1857, and then be sold by the defendant to pay the debt, unless sooner paid, and the hire of the slave in the meantime to discharge the interest on the debt; and that the said slave died, without the fault of the defendant or his overseer, before the death of said James M. Flanagan, and before December, 1857, then they should find for the defendant."

The rulings of the court on the evidence, the charge given to the jury, and the refusal of the charges asked, are now assigned as error.

MORGAN & BYRD, for appellant.—The rents, income, and profits, of the wife's separate estate under the Code, belong to the husband, who alone has the right to sue for

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and recover them.—*Whitman v. Abernathy*, 38 Ala. 154; *Sessions v. Sessions*, 38 Ala. 522; *Pickens v. Oliver*, 29 Ala. 532. He is entitled to receive and receipt for any property belonging to his wife's separate estate; has the right to invest the proceeds arising from a sale of it, or to use them for the benefit of the wife; the right, also, "to manage and control" her property at his discretion, subject only to the revisory power of the chancellor; and has a contingent right of survivorship, to the extent of one-half of the personalty, which becomes absolute on the death of the wife intestate. With all these rights, interests, powers and duties, devolved upon him by statute, it would be a strange construction, which would confine his "management and control" of the property to the passive receipt of the rents and profits, without power to hire or pledge the property, and thereby make it produce income or profits. He alone can determine what is the most judicious mode in which to employ the property; and the wife can only avoid his acts through the interposition of the chancellor, when her title to the property itself is thereby endangered.

D. W. BAINE, *contra*.—The principle on which the case of *Boaz v. Boaz*, (36 Ala. 334,) was decided, is equally decisive of this case. To give the husband power to mortgage or pledge the wife's separate property, without her assent, for his own individual debt, would enable him to defeat the object and purpose of the statute, as declared in that case.

STONE, J.—[July 11, 1861.]—The controlling point in this record arises on the construction of section 1983 of the Code. That section reads as follows: "Property thus belonging to the wife, [her statutory separate estate,] vests in the husband as her trustee, who has the right to manage and control the same, and is not required to account with the wife, her heirs, or legal representatives, for the rents, income, or profits thereof; but such rents, income and profits, are not subject to the payment of the

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debts of the husband." It will be seen that this section of the Code vests the legal title of the wife's separate estate in her husband; gives him the right to manage and control the same, and relieves him from all accountability for its income and profits to the wife, her heirs, or legal representatives. The provisions of the statute, conferring on the husband the right of control, and exempting him from liability to account, go no further than this.

Under the act of 1850, which substantially conforms to the section of the Code above copied, this court, in the case of *Weems v. Bryan*, (21 Ala. 308,) considering the rights of a surviving husband in the statutory separate estate of his deceased wife, said: "Under this provision, there can be no doubt but that the husband becomes tenant for the life of the wife, (*per autre vie*), of the rents and profits of the wife's estate. The right 'to have and possess, control and manage,' her property during the coverture, without liability to account, makes him so. Like every other tenant for life, he is entitled to emblements," &c.

In the case of *Bennett v. Bennett*, (34 Ala. 56,) we withheld express approbation of the opinion in *Weems v. Bryan*, (*supra*.) but adhered to it as a rule of property.

So, in *Pickens v. Oliver*, (29 Ala. 532,) we followed out the principle announced in *Weems v. Bryan*; and, although the question was not directly presented, we said that, in the rents, income and profits, of the wife's statutory separate estate, the husband, during the continuance of the trust, is entitled to the entire interest, and the wife to no part of it. The same principle had been substantially affirmed in the older decision at the same term of *Andrews v. Huckabee*, 30 Ala. 143. And in *Whitman v. Abernathy*, (33 Ala. 160,) we followed this principle, and ruled, that the wife could not recover from the husband's vendee the hires of slaves belonging to her separate estate, which hires accrued during the continuance of the trusteeship. See, also, *Rogers v. Boyd*, 33 Ala. 175; *Smyth v. Oliver*, 31 Ala. 39; *Durden v. McWilliams*,

ib. 438; Cowles v. Morgan, 34 Ala. 535; Alexander v. Saulsbury, January term, 1861.

It will be observed that, in most of these cases, the right of the husband to the rents, income and profits, is predicated on the assumed and unqualified ground, that he was *not liable to account therefor*. Such was the statement of the principle in Weems v. Bryan, and the later cases followed its lead. The language of the Code is, that the husband "is not required to account *with the wife, her heirs, or legal representatives*." There may be a distinction between a general exemption from liability to account, and a qualified exemption from liability to account *with the wife, her heirs, and legal representatives*. Whether a husband, holding in his hands the income and profits of the wife's separate estate, can be made to account for such income and profits to creditors of the wife, is a question which has not been considered in this court, and we do not now propose to consider it. Nor will we inquire whether any peculiar significance attaches to the form of the expression, "is not required to account *with the wife, her heirs, or legal representatives*." These questions will be disposed of when they arise.

In the later case of Boaz v. Boaz, (36 Ala. 334,) we think we furnished a much more satisfactory solution of the question under discussion, than is contained in the general language of the opinion in Weems v. Bryan, followed, as that language was without question, in the later cases. We there said, "The legislature, in making the exemption from liability for the husband's debts, certainly did not look alone to his benefit. It would be a strange anomaly in legislation, if the husband has been clothed with a right to the entire income of the wife's property, exempt from liability to his debts, for no purpose beyond the bestowment of a peculiar boon upon him. But furthermore, the peculiar language of the statute is indicative of an ulterior purpose. It first declares, that the property is the wife's separate estate. It then vests it in the husband *as a trustee*, and proceeds to declare, not that the income belongs to the husband, but

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that he shall not be required to account for it. The husband, therefore, holds the property as trustee, and is entitled to the income, merely because he is not required to account for it as trustee. It is a fair inference from these provisions, that the husband is not vested with a title in his own right, for any space of time, to the wife's separate estate; that the law has permitted him to receive the income, with the purpose that he might, as the head of the family, have the means of maintaining that family; and has made it free from liability to debts, in order that his misfortunes and thriftlessness should not prevent the accomplishment of the purpose."

In promotion of this line of argument, we may well inquire, if the legislature intended to confer on the husband the unqualified property in the income and profits during the joint lives of himself and wife, why did they not express that intention in plain and unambiguous language? Why, when simple words would so much better subserve their purpose, employ the circumlocution, that the husband, as trustee, should have the right to manage and control the property, without liability to account with the wife, her heirs, and legal representatives, for the rents, income, and profits? If the intention was to make an absolute gift, why restrict the language which exempted him from liability to account? These questions we ask, without intending to answer them.

It is not our intention to weaken or overturn any decision heretofore made, bearing on section 1983 of the Code. Those decisions have doubtless been acted on, and have become rules of property. But we are not inclined to enlarge the husband's interest in the wife's separate estate.

Following out the principles declared in the case of *Boaz v. Boaz*, (*supra*), it is manifest that a mortgage or pledge of the wife's separate property, by the individual contract of the husband, and for his individual debts, is not within the pale of the authority which the woman's law confers on the husband and trustee. The intention and policy of the law, as was shown by the result of the

case of *Boaz v. Boaz*, are, that the wife shall receive a support from the labor and income of the separate estate. Hence, Mr. Boaz, by withdrawing his protection and supervision from the home of his family, was declared to have forfeited his right to continue in the exercise of the trust; and, for that cause alone, he was removed.

So, in this case, Mr. Flanagan, by mortgaging the slave, for his own debt, has assumed an ownership and control of the property, not compatible with the purposes of the trust. This can not, with any propriety, be classed as an act of management or control of the property, with a view to the maintenance of the family. It is, so far as we can discover, a placing of the property beyond the reach of the family; not as a means of securing to the wife the enjoyment of her property, but as a means of raising money for the benefit of the husband.

If we were to hold, that the statute confers on the husband *the right* to so dispose of the separate estate of the wife, it would follow, that the wife could not complain of this rightful exercise of authority; and would not such principle arm the husband with power to defeat the very object of the statute, as declared by itself, and by this court in the cases of *Smyth v. Oliver*, and *Boaz v. Boaz*? We will not further elaborate this view.

That the husband may hire or lease out the separate property of the wife, as a general rule, we will not deny. Such hiring or leasing may be one, and, in the circumstances, the most advantageous mode of maintaining the family from the income of the separate estate. This power might be abused; and for the correction of that abuse, the interference of the chancellor may be invoked, —with what success or show of right, we will not now anticipate.

It results from what we have said, that the circuit court did not err in giving the first affirmative charge, and in refusing the second and fourth charges asked. The second affirmative charge was not excepted to, and we need not consider it.

[2.] The court did not err in admitting in evidence the

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declarations of Mrs. Flanagan's father, made while he was in possession of the slaves, and explanatory of his possession; also, in disparagement of his title. That he claimed to hold them under a will, or supposed will, can not vary their legality as *res-gestæ* declarations.—Shep. Dig. 591, *et seq.*; Thomas v. Degraffenreid, 17 Ala. 602.

[3.] The testimony offered, tending to show that the slave Ellen died anterior to the death of Mr. Flanagan, was wholly immaterial, and was rightly excluded on that ground, if no other.

Judgment affirmed.

ALEXANDER vs. SAULSBURY.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Validity of sale, by wife alone, of statutory separate estate; whether action lies to recover agreed price.*—A sale by the wife alone, without the concurrence of her husband, of property belonging to her statutory separate estate, is absolutely void, and passes nothing to the purchaser; and the wife cannot maintain an action at law, in her own name, to recover the value or agreed price of the property.

APPEAL from the Circuit Court of Barbour.

Tried before the Hon. JNO. GILL SHORTER.

THE complaint in this case was in the following words:

<p>“Mary S. Saulsbury vs. Ezekiel Alexander.</p>	}	<p>The plaintiff claims of the defendant fifty-six 95-100 dol- lars, due by account for goods and merchandize furnished by plaintiff to defendant, at his instance and request; which account was payable on the 1st January, 1854, with interest thereon. The plain- tiff avers, that, at the time of the purchase of said goods</p>
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and merchandise from her by the defendant, and at the commencement of this suit, she (the said plaintiff) was a married woman, and had a separate estate secured to her separate use by virtue of a statute, passed by the legislature of Alabama, commonly called 'the woman's law;' and that said goods and merchandize, so furnished to defendant at his instance, were a part of her said separate estate."

The defendant demurred to the complaint, on the following grounds: "1st, because, on the facts stated in the complaint, the plaintiff has no right to maintain this action in her own name; 2d, because, on the facts stated in said complaint, the plaintiff's husband should have been joined as co-plaintiff with her; and, 3d, because the facts stated fail to show such separate estate as will authorize the maintenance of this suit by her alone." The overruling of the demurrer, with other matters which require no particular notice, is now assigned as error.

R. C. BULLOCK, for appellant, cited *Pickens v. Oliver*, 29 Ala. 582; and *Gibbons v. Marquis*, *ib.* 672.

GOLDTHWAITE, RICE & SIMPLE, *contra*, cited *High v. Worley*, 83 Ala. 196; *Saunders v. Garrett*, 83 Ala. 454; *Smyth v. Oliver*, 81 Ala. 89; *Drake v. Glover*, 80 Ala. 882; and *Duncan v. Stewart*, 25 Ala. 408.

R. W. WALKER, J.—[Feb. 14, 1861.]—A married woman, having a statutory separate estate, sells and delivers to the purchaser's portion of the same, without the concurrence of her husband; can she, by suit upon the contract, in her own name, recover of the purchaser the value, or agreed price of the property? Our opinion is, that this question must be answered in the negative.

Section 2181 of the Code provides, that "husband and wife must be joined, either as plaintiff or defendants, when the wife has interest in the subject-matter of the

suit, unless the suit relate to her separate estate, when she must sue or be sued alone." The effect of this section was very carefully considered by the court, in *Pickens v. Oliver*, (29 Ala. 528;) and it was there held, that the rule established by the latter clause of this section, "must be confined to suits for the *corpus* of the property, and for damages to the property itself, as distinguished from its use." This is clearly not a suit "for damages to the property" constituting the wife's separate estate. If it can be maintained at all, it must be upon the ground, that it is a suit for the *corpus* of the property. Although all the property of the wife, held by her previous to her marriage, or which she may become entitled to after her marriage, in any manner, is her separate estate, and is not subject to her husband's debts; yet all such separate estate "vests in the husband, as her trustee, who has the right to manage and control the same, and is not required to account for the rents, income or profits, to the wife, her heirs, or legal representatives."—Code, § 1988. Thus it will be seen, that the *corpus* of the property belongs to the wife, while the right to control and manage the same, free from accountability for the rents, income, or profits, is vested in the husband. Section 1984 provides, that "the property of the wife, or any part thereof, may be sold by the husband and wife, and conveyed by them jointly, by instrument of writing, attested by two witnesses." This provision is obviously restrictive of the right of disposition, and was doubtless intended to prohibit the sale of the wife's property, except such as might be made by the husband and wife.—*Smyth v. Oliver*, 31 Ala. 48. See, also, *Whitman v. Abernathy*, 38 Ala. 159; *Rogers v. Boyd*, 33 Ala. 175; *Drake v. Glover*, 30 Ala. 389. We think, therefore, that a transfer of her statutory separate estate by the wife, without the concurrence of the husband, in the manner provided by the statute, is, in a court of law at least, absolutely void, and passes nothing to the purchaser.—See *Smith v. Flower*, 15 East, 607. The title to the property so transferred is

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in nowise affected thereby, and the property remains, as before, the separate estate of the wife.

By the common law, a married woman can neither sue nor be sued alone, and all contracts made by her are void. 1 Parsons on Con. 286. These disabilities of coverture the Code modifies, but does not destroy. Beyond its express provisions, married women are no more *sui juris* than they were before its adoption.—Pickens v. Oliver, 29 Ala. 528. Hence it follows, (so far, at least, as a court of law is concerned,) that a married woman has no legal capacity to contract in relation to her separate estate, except for the purpose, and in the manner, provided by the statute; and as a sale of such separate estate, made by the wife alone, without the concurrence of the husband, is unauthorized by the statute, every such contract of sale is void; and being void, it can form no foundation for a suit at law in the name of the wife.

It will not do to say, that a married woman, having a separate estate, is capable of electing to have either the property sold, or the value or agreed price thereof; and that, on her electing to receive or sue for such value or agreed price, it becomes her separate estate, in lieu of the property sold, which she is, by such election, estopped from ever claiming thereafter. If this be so, of what avail would be the provisions of the statute, that the husband shall manage and control the estate, and receive the profits without liability to account to the wife, her heirs, or representatives; and that no part of the property shall be sold without his concurrence? If we are to yield obedience to the statute, we must hold, (whenever, at least, the question arises in a court of law,) that a married woman is incapable, by any independent act or contract of hers, of *converting the corpus* of her separate estate.

It is true that, in the case of a wrong-doer selling property without title, the purchaser, while he holds under a contract of sale, cannot resist the payment of the purchase-money.—Duncan v. Stewart, 25 Ala. 413. But it never was understood, that a person, by contracting with a married woman, admitted her right to sue in *her own*

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name on the contract, or precluded himself from pleading her coverture in bar of such a suit. On the contrary, the rule of the common law is, that if the wife sell any thing, her husband alone has the right to recover the price.—1 Parsons on Contracts, 286-7.

As the rulings of the circuit court were in conflict with these views, the judgment must be reversed, and the cause remanded.

MANLY'S ADM'R vs. TURNIPSEED AND WIFE.

[DETINUE FOR SLAVES.]

1. *When statute of limitations begins to run.*—The statute of limitations does not begin to run against an intestate's estate, until the appointment of an administrator; but it is not necessary that there should be a domestic administrator, when the intestate dies in a foreign State, and administration on his estate is there granted by the proper tribunal, although such foreign administrator may have never had his letters recorded here, as authorized to do by the act of 1821. (Clay's Digest, 227, § 31.)
2. *What constitutes adverse possession.*—A knowledge on the part of an adverse holder that his title is defective, does not, of itself, prevent the operation of the statute of limitations in his favor.

APPEAL from the Circuit Court of Calhoun.
Tried before the Hon. S. D. HALE.

THIS action was brought by M. J. Turnley, as the administrator of Washington Manly, deceased, to recover a negro woman named Elizabeth, and her five children; and was commenced on the 12th March, 1857. The defendants pleaded, "in short by consent, *ne unques administrator*, the statute of limitations of six years, and the general issue, with leave to give in evidence any matter that might be specially pleaded." The woman Elizabeth,

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as appeared from the evidence adduced on the trial, belonged to said Washington Manly at the time of his death, which occurred in June, 1838, at his residence in Stewart county, Georgia; he dying intestate, and leaving a widow and several children. In October, 1838, the widow and children removed to Calhoun county, Alabama, bringing the slaves with them. In December, 1838, the orphans' court of Calhoun appointed William Walker guardian of said intestate's minor children; and he continued to act in that capacity, having the control and management of the slaves, until the 23d January, 1840, when he resigned, and Henry Amarine was appointed guardian in his stead. Some time during the year 1842 said Amarine married the intestate's widow, and he continued to act as the guardian of the children, having the possession and control of the slaves, until the 3d March, 1848, when he resigned, and William Barker was appointed by said court, guardian of said children. In November, 1845, said Barker applied to said court for an order to sell the slaves; alleging, as the ground of his application, that the intestate's widow (then Mrs. Amarine) was entitled to a distributive share of them, and that they could not be equally divided without a sale. The court granted the order, and the slaves were sold, pursuant to its terms, on 28th December, 1848, and were purchased at the sale by said Amarine, who, on the 6th December, 1855, sold and conveyed them to the defendants. The plaintiff's letters of administration were granted, by the probate court of Calhoun county, on the 10th March, 1857. There had been no previous administration on said estate in this State; but letters of administration had been granted by the proper court in Stewart county, Georgia, on the 11th January, 1847, to one George L. Smith.

On the foregoing facts, the court charged the jury as follows: "If the jury believe, from the evidence, that Washington Manly died in Georgia, in 1838, the owner of the woman Elizabeth; and that the other negroes sued for are the children of Elizabeth; and that said negroes,

shortly after the death of said Manly, came to Alabama with his widow and children; and that in December, 1848, Barker, acting as the guardian of said children, held and claimed the negroes, as such guardian, in good faith, and, on that day, sold them under an order of the orphans' court of said county, believing that he was selling and conveying a good title; and that Amarine became the purchaser at said sale, in good faith, and at a fair price, believing that he was buying a good title; and that he complied with the terms of the sale, took possession of the slaves, and, in good faith, openly held, claimed and controlled them as his own, until the 6th December, 1855, and then sold them to the defendants, for a fair and full price, believing that he was selling a perfect title; and that the defendants purchased in good faith, believing that they were obtaining a good title; and held and claimed the slaves openly as their own, down to the commencement of this suit; and that George L. Smith was appointed administrator of the estate of said Washington Manly, in Stewart county, Georgia, on the 11th January, 1847, (as shown by the record which has been read in evidence,) where said Manly died; and that said Smith, at the time of his said appointment, had notice that said slaves were in the county of Calhoun or Randolph, Alabama,—then the statute of limitations had, at the time this suit was brought, barred any action to recover the slaves by an administrator of said estate, and they must find for the defendants."

The plaintiff excepted to this charge, and requested the court to give the following charges, which the court refused to give, and the plaintiff excepted to their refusal, to-wit:

"1. If the jury believe that the slaves were originally the property of Washington Manly, who died in Georgia, in 1839; and that said slaves were removed into this State in 1839, by the widow, without any administration thereon, and have continued in this State until the present time; and that there was no administration on Manly's estate, in Alabama, until the plaintiff was appointed in 1857,

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—then the statute of limitations would not run in favor of the defendants until the plaintiff's said appointment.

"2. If the jury believe that the slaves were once the property of Washington Manly, and were removed from Georgia, by the widow, without any administration thereon, and have continued in this State until the present time; and that there has been no administration on said slaves, in this State, until the plaintiff was appointed in 1857,—then the statute of limitations did not run in favor of the defendants until the plaintiff was appointed administrator, although George L. Smith was appointed administrator of said estate, in Georgia, in the year 1847."

"3. If the jury believe that Amarine, at the time he purchased the slaves, had a knowledge that there had been no administration on Manly's estate, then he took no title by his purchase; and if the defendants had notice of a defect of title, when they purchased from said Amarine, they took no title.

"4. The appointment of Barker, as guardian of Manly's children, gave him no rights over the property of Manly's estate here.

"5. If the slaves were originally the property of Washington Manly, who died in Georgia in 1839, and were removed here by his widow, without administration, and have continued in this State up to the commencement of this suit,—then the appointment of Smith in 1847, as shown by the record, did not vest the property in him as administrator, and the statute of limitations could not run against plaintiff until his own appointment.

"6. If the jury believe that Amarine bought, at the guardian's sale, with a full knowledge that the slaves had never been administered upon, either in this State or in Georgia, then his purchase was not in good faith, and the statute would not run in his favor; and then, if the defendants have not held the slaves more than six years since they purchased from Amarine, the statute would not effect a bar in their favor, although Smith was appointed in 1847 in Georgia.

"7. If the jury believe, from the evidence, that the wo-

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man Elizabeth was the property of plaintiff's intestate at the time of his death in Georgia in 1838, and was brought to Alabama, shortly after said intestate's death, by his widow; and that said widow married Henry Amarine in this State; and that said Amarine took possession of said slaves, as the guardian of said Manly's children, knowing that said slaves had [not] been administered; and that the slaves afterwards went into the possession of Barker, as the guardian of said minor heirs, and were sold by him as such guardian, knowing that no administration had been had on them, and were purchased at the sale by said Amarine, with such knowledge, and the defendants had knowledge that said slaves had never been administered upon,—there could be no good faith in said several sales and purchases."

The charge given by the court, the refusal of the several charges asked, and the rulings of the court on questions of evidence, to which exceptions were reserved, (but which require no particular notice,) are now assigned as error.

G. C. WHATLEY, for appellant.—When a person dies intestate, the statute of limitations does not begin to run against his estate, until the appointment of an administrator who is capable of suing.—*Lawson v. Lay*, 24 Ala. 186; *Wyatt v. Rambo*, 20 Ala. 510. As the plaintiff's letters were granted only a few days before the suit was commenced, and there had been no previous administration on his intestate's estate in this State, his claim could not be barred by the statute, unless the appointment of an administrator in Georgia, in 1847, brought the case within the operation of the statute. But no such effect can be attributed to the foreign administration. In the absence of statutory regulations, a grant of letters of administration has no extra-territorial operation, and an administrator can neither sue nor be sued in another State.—*Vaughan v. Northup*, 15 Peters, 2; *Harrison v. Mahorner*, 14 Ala. 884. Under our statute, (Clay's Digest, 227, § 81,) a foreign administrator may sue here,

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upon complying with certain conditions; one of which conditions is, that he shall first have his letters recorded here, and give bond "for the faithful administration" of the assets; and the statute expressly provides, that he shall not be entitled to receive or recover any property of the estate, until he has complied with these requisitions. A compliance with these provisions makes an ancillary administration here.—*Robinson v. Robinson*, 11 Ala. 950. A foreign administrator is not bound to sue here: it is not his duty to sue here, and he is not guilty of a *devastavit* for a failure to sue.—*Davis v. Smith*, 5 Geo. 295. If the Georgia administrator was not bound to sue here, and could not demand or recover the property without first complying with the requisitions of our statutes, no right of action vested in him by his appointment, and the statute of limitations did not begin to run against him.—6 Bacon's Abr. 398, note a; *Johnson v. Wren*, 3 Stew. 179; 1 Kelly, (Geo.) 380. If he had complied with all the conditions imposed by the statute, and then commenced suit to recover the slaves, his action might have been defeated by the appointment of a domestic administrator.—*Broughton v. Bradley*, 34 Ala. 694; 3 Mass. 540. An executor may commence suit before he qualifies; but the statute of limitations does not begin to run until his qualification and acceptance of the trust.—6 Geo. 316.

2. To render a plea of the statute of limitations available, there must be an adverse possession; and to constitute an adverse possession, the holding must be in good faith, and without notice. The defendants had actual knowledge of the defect in their own title, and are chargeable with implied notice of the plaintiff's claim.—*Johnson v. Thweatt*, 18 Ala. 747; *Nelson v. Allen & Harris*, 1 Yerger, 366.

HEFLIN & FORNEY, ALEX. & JNO. WHITE, contra.—Under the statute of 1821, (Clay's Digest, 227, § 31,) the Georgia administrator had a right to commence suit here for the recovery of the slaves; and he was only required to record

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his letters, give bond, &c., after the rendition of a judgment in his favor, before he was entitled to receive the property. He was obliged to produce his letters on the trial, as the evidence of his right to sue, just as a domestic administrator would. The recording of his letters, giving bond, &c., did not constitute a condition precedent to his right of action. As well might it be contended, that the statute of limitations would not run, in an attachment case, against a foreign administrator who had complied with all the requisitions of the act of 1821, because he was required to execute an attachment bond; or that the statute does not run against corporations, or in actions of detinue, bills for injunction, &c., and other analogous cases in which bonds are required of the parties suing. All the analogies of the law are in favor of his right to sue, and the adjudged cases equally support it.—*Shultz v. Pulver*, 11 Wendell, 361; *McCullough v. Young*, 1 Binney, 68; *Howell v. Hair*, 15 Ala. 194; *Broughton v. Bradley*, 34 Ala. 594. Moreover, the slaves were in Georgia at the time of the intestate's death, and the Georgia administrator knew that they had been removed to Alabama without authority of law, and where they were to be found; and it was not only his right, but his duty to sue for them.

A. J. WALKER, C. J.—[June 4th, 1861.]—The plaintiff's intestate died in possession of the slaves, for the recovery of which this suit is brought; and had his domicile, at the time of his death, in Georgia. The defendants, and the person from whom they bought, have been in adverse possession for more than six years before the commencement of suit. The plaintiff's administration was obtained less than six years before the commencement of suit, and there had been no previous administration in this State. There was an administration in Georgia, more than six years before this suit was brought, and before the plaintiff was appointed. If there had been no other administration than the plaintiff's, it is very clear that the defense of the statute of limitations would not

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have been available. The operation of the statute, after the death of the intestate, can not commence until there is an administrator.—*Lawson v. Lay*, 24 Ala. 184; *Johnson v. Wren*, 8 St. 172. This is admitted by the appellees; but it is contended, that the operation of the statute is secured by the existence of an administration in Georgia, to which the right of suit attached by virtue of our statute, found in *Clay's Digest*, 227, § 81; and that is the position, upon the correctness of which we are to decide.

The statute of limitations which applies to this case, explicitly declares, that all actions of detinue shall be commenced within six years next after the cause of such action shall have accrued, and not after.—*Clay's Digest*, 326, § 78. Notwithstanding this explicit language of the law, the courts, from the clear justice and propriety of the thing, have engrafted an exception, in favor of those cases in which there is no person to sue.—*Ang. on Lim.* 61, § 50. Our statute gives a right of suit, in the absence of an administration here, to the administrator in a sister State; and it would be a manifest enlargement of the exception, to include a case where there was such a foreign administrator. We do not pause to consider whether it is obligatory upon the foreign administrator to sue, when there is no administration in this State.—*Shultz v. Pulver*, 11 Waud, 361; *Helms v. Sanders*, 3 Hawks, 562. It may be conceded, that the statute merely secures a privilege to the foreign administrator, of which he may or may not avail himself at his election; and from the concession no inference in favor of the appellant can be deduced. The exception is founded upon the want of a person who can sue, and not upon the want of a will to sue. No person, save those who are acting in a trust capacity, is bound to sue. The right of suit is merely permissive; and the operation of the statute is grounded upon the idea, that persons having the permission of the law, to sue, forbear to do so, but acquiesce in the assertion of a hostile right. The efficiency of the statute would be utterly destroyed, and its

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command disregarded, if it were allowed no operation except where there was an obligation to sue.

It is contended, however, that the right of suit does not attach to the foreign administrator, by virtue of his foreign appointment, but grows out of his recording the letters of administration, and giving bond, as required by our statute; and that, upon complying with those requisites, an ancillary administration springs up in this State, under which the suit is maintained, and the assets received. This argument is supposed to be favored by the fact, that this court, in *Robinson v. Robinson*, (11 Ala. 347,) spoke, *arguendo*, of the recording of the letters of administration, and giving the prescribed bond, as "in effect an ancillary administration." We do not think the argument is supported by the incidental remark alluded to. The court intended nothing more than to convey the idea, that a foreign administrator, who had complied with the statute, had authority, like that of an ancillary administrator appointed in this State, to recover assets of the estate, which were the subject of an administration in this State. That a foreign administrator, who complies with our statute, does not become an ancillary administrator, and recover assets here in a new capacity, derived in this State, is conclusively shown in the case of *Broughton v. Bradley*, 34 Ala. 694. If such foreign administrator became an ancillary administrator, within the jurisdiction of this State, it would follow, that no ancillary administrator could afterwards be appointed in this State, and that the authority of the foreign administrator could not be overthrown by the appointment of an ancillary administrator; yet the reverse of these things is held in the case referred to.

The conclusion can not be resisted, that a foreign administrator, under our statute, is permitted to act in this State, by virtue of his foreign appointment, and in the capacity derived from that appointment. The language of the statute itself does not admit of any other conclusion. - It bestows the right upon the foreign administrator to maintain any action, to demand and receive any

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debt, and to exercise all the rights and privileges which he would have done if duly appointed and qualified in this State. It does not even require that the letters of administration should be recorded before suit is brought. The foreign administrator is permitted to sue here, without a solitary preliminary step. This conclusively shows, that our law recognizes in him a right of action by virtue of the foreign appointment. The requisition, that the foreign administrator shall, before receiving any assets of the estate, record his letters of administration, and give bond, does not militate against the operation of the statute. The prescribing of conditions, necessary for the security of persons interested, as a preliminary to a remedy, can not justify an exception from the statute. If it did, there could be no prescription against an action which the law required should be preceded by the giving of security for cost, or other bond; and yet, we apprehend, an argument for the exemption of such cases from the statute would not be made.

The statute of limitations was designed to be one of repose. Its effect is beneficent. It quiets titles, lessens litigation, and promotes justice, by requiring the settlement of controversies before time has obliterated any of the evidence. Its operation ought to be maintained with a steady hand. This we should not do, if we allowed it no effect against a foreign administrator, clothed by our law with a right to sue. A foreign administrator, if he is not affected by our statute of limitations, might designedly fold his hands, and remain quiet, until time should destroy all the evidences upon which a just defense depended, and then obtain an unrighteous recovery. It would be a most unjust and unreasonable discrimination, to bar by the lapse of time the claims of our own administrators, and yet put no limit to the right of suit, on the same claims, in favor of a foreign administrator; yet this discrimination the appellant asks us to make. When the legislature gave a right of suit to foreign administrators, it must have intended that they should be subject to the same defenses as other administrators.

[2.] The bill of exceptions contains the entire evidence. We clearly perceive that the ruling of the court, in refusing to suppress the answer mentioned in the brief of appellant's counsel, even if erroneous, did not affect the result of the trial, and did the appellant no injury. A knowledge on the part of an adverse holder that his title was defective, would not, of itself, prevent the operation of the statute in his behalf.

We do not deem it necessary to notice particularly each separate charge asked, and each ruling upon evidence. What we have said covers all the points made by the counsel. There is no reversible error in any of the rulings of the court below, and its judgment must be affirmed.

GREENE'S EXECUTOR vs. SPEER AND WIFE.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Advancements in cases of partial intestacy.*—In cases of partial intestacy, advancements are not required to be brought into hotchpot. (Code, §§ 1582, 1596,) to entitle the parties to share in the property undisposed of by the will.

APPEAL from the Probate Court of Marengo.

IN the matter of the estate of Richard Greene, deceased, on final settlement of the accounts of Thomas J. Woolf, the executor, and distribution of that part of the estate which was left undisposed of by the decedent's will. The decedent died in August, 1856, leaving a widow and six children. By his last will and testament, which was executed on the 14th August, 1862, and duly admitted to probate soon after his death, he gave the bulk of his estate, which consisted of lands, slaves, money, &c., in

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specific legacies to his wife and children; but died intestate as to certain personal property, which had been acquired by him after the execution of his will, and which was sold by the executor under an order of the probate court; the proceeds of sale, after deducting the costs and expenses of administration, amounting to more than \$7,000. The executor filed a petition in the probate court, alleging that the testator, after the execution of his will, had given to his daughter Julia, the wife of William S. Speer, two negroes, valued at \$2,200, and \$600 in money, and that this property was given to her as an advancement; and praying that Speer and wife might be required to bring this property into hotchpot, or be excluded from the distribution of the funds in his hands arising from the sale of the property undisposed of by the will. The court sustained a demurrer to this petition, and, on the final settlement, decreed to Mrs. Speer a distributive share of the funds equal to the shares of the other children. The executor excepted to this decision and decree of the court, and he now assigns the same as error. •

BROOKS & GARROTT, for appellant.—Section 1582 of the Code requires, that advancements, made by an intestate in his life-time, shall be brought into hotchpot; and section 1596 expressly provides, that, in cases of partial intestacy, "all property not disposed of by will must be distributed as in cases of intestacy." As the legacies were specific, and could not be adeemed, the distribution could only be equalized by bringing the property into hotchpot. "A case of partial intestacy falls under the general law applicable to cases of that character, which provides for distribution of the property not bequeathed, as if no will at all had been made."—*Bryan v. Weems*, 25 Ala. 295; *Denson v. Autrey*, 21 Ala. 205.

JNO. T. LOMAX, *contra*.—Section 1582 of the Code applies only to the estates of intestates, as is shown by the entire chapter of which it forms a part. The statutes

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relative to advancements, and all the legal principles which the courts have applied to the subject, are intended to effectuate the presumed desire and intention of parents, in making an equal and impartial distribution of their estates among those who have equal claims on their affection and bounty. To apply the same rule in cases of partial intestacy, instead of equalizing the distribution, would, in most cases, create great injustice, and violate the intention of the testator. Whether a gift is to be considered an advancement, is a question of intention, and depends on the circumstances attending the transaction. The subsequent execution of a will, without noticing such gift, is strong evidence of an intention that the gift shall not operate as an advancement; and equally strong evidence would be afforded, where the gift was made after the execution of the will, if no corresponding change, by amendment or codicil, was made in the will. These views are fully sustained by the following authorities: 2 Wms. on Exrs. 1286; 2 Lomax on Exrs. 363, 365; Thompson v. Carmichael, 8 Sandf. Ch. 120; Newman v. Wilbourne, 1 Hill's Ch. 10; Snelgrove v. Snelgrove, 4 Dess. 274; Donnell v. Mateer, 5 Iredell's Eq. 7.

STONE, J.—[June 28, 1861.]—We have duly considered the single question presented by the assignments of error in this case, and are satisfied the judgment of the probate court must be affirmed. Section 1582 of the Code, which declares the rule for bringing advancements into hotchpot, refers alone to estates of intestates. Looking only to this section, it would require bold interpolation to bring under its influence estates of testators who left portions of their estates undisposed of by their wills.

The argument for appellant rests mainly for its support on section 1596 of the Code. The argument carries the language of the statute too far. It (the statute) provides only for "property not disposed of by will." What property? Certainly, *property owned by the testator at the time of his death*; not property which he had previously

given off. This property "must be administered and distributed as in cases of intestacy."

The doctrine of hotchpot rests, for its justification, on the presumed desire of decedents to equalize the portions of all distributees standing in the same relation to them. In cases of intestacy, it operates with justice and equality, for it bears alike on all who have been advanced. This would rarely be the case, where there is a will. In a majority of cases, parents, during their life-time, have made gifts, by way of advancement, to their older children; and when they come to make a will, they usually attempt to make up to the children not advanced, what they, in their discretion, intend as the equivalent of the advancements previously given off. In other words, the advancements given off, and the bequests contained in the will, are, collectively, *the distribution* which the testator desires to make. Now, let it be supposed that a testator, after executing his will on the theory above supposed, should materially increase his estate by his industry, or by receiving a legacy; and as to such after-acquired estate, should die intestate. Would not the doctrine here contended for lead to the most shocking inequality? And yet, in a majority of cases, this precise result would follow. Any rule we lay down, in reference to advancements and hotchpot in cases of partial intestacy, must be uniform, and operate alike in all cases, unless the testator has given express directions to the contrary. We think a rule which should require advancements to be brought in, in cases of partial intestacy, would work much greater oppression, than to follow the letter of section 1562 of the Code, and limit the doctrine to cases of *intestacy proper*.

We have thus far considered this question on the language of the statute, and the spirit which dictated its enactment. The authorities, both English and American, fully sustain our views. Sir Wm. Grant, speaking of this doctrine, said, "I conceive, the provision in the statute of distributions applies only to the case of actual intestacy."—*Walton v. Walton*, 14 Vesey, 824. Chief-Jus-

tice Ruffin, in *Donnell v. Mateer*, (5 Iredell's Equity, 11,) said, "With respect to a personal residue, it has been always held, that it is to be divided equally amongst the next of kin, without regard to gifts, either in the life-time of the testator, or by his will." In *Thompson v. Carmichael*, (8 Sandf. Ch. 129,) it was said, "When one has advanced a part of his children, and then by will devises property to the residue, leaving other property undisposed of; it is a legal and reasonable presumption, that he intended the latter to go to both classes of his children equally, if any of it remained at his death. As to one class, he has been his own executor; as to the other, he has by his will placed them on an equal footing with the first class." To the same effect are *Twisden v. Twisden*, 9 Vesey, 426; *Johnson v. Johnson*, 4 Ired. Law, 9; *Sinkler v. Sinkler*, 2 Dess. 139; *Snelgrove v. Snelgrove*, 4 Dess. 291; 2 Wms. on Exrs. 1286; 2 Lomax on Exrs. 855, § 15; *Newman v. Wilbourne*, 1 Hill's Ch. 10. Decree affirmed.

ESPY vs. JONES.

[ACTION FOR BREACH OF PROMISE TO MARRY.]

1. *Admissibility of seduction in aggravation of damages.*—If evidence of seduction can be received, in any case, to aggravate the damages, in an action for a breach of promise to marry, it is only where the seduction follows the promise, and is effected by means of it: seduction prior to the promise is not admissible evidence.
2. *Charge misleading jury.*—A charge which predicates the plaintiff's right to recover on the proof of a promise and breach thereof, and actively disregards the evidence adduced by the defendant tending to show a justification of the breach, is erroneous.
3. *Assent of parties to contract.*—It is essential to the validity of a contract to marry, that there should be reciprocal promises between the parties; but, if a man makes an express offer or promise of

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marriage to a woman, her acceptance and reciprocal promise may be established by proof of her conduct and action at the time, as well as by express words.

4. *Justification of breach of promise to marry.*—If a man promises to marry a woman whom he believes to be virtuous and modest, and afterwards discovers that she is loose and immodest, he is justified in breaking his promise; but, to entitle him to a verdict on that ground, the jury must be satisfied that the plaintiff is a loose and immodest woman, that the defendant broke his promise on that account, and that he did not know her character at the time he made the promise.
5. *Admissibility of plaintiff's want of chastity in mitigation of damages.* Acts of fornication, committed by the plaintiff prior to the defendant's promise to marry her, and in which the defendant himself participated, are not admissible evidence for him in mitigation of the damages.

APPEAL from the Circuit Court of Marengo.
Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by Maria F. Jones, against David Espy, to recover damages for a breach of promise of marriage. The defendant pleaded the general issue, "in short by consent, with leave to give any special matter in evidence." On the trial, as the bill of exceptions states, one of the plaintiff's sisters, who was examined as a witness on her behalf, testified, "that she heard defendant, in 1853, ask plaintiff's mother for her; and that, in 1854, plaintiff prepared her dress to marry defendant;" and this witness and another sister both testified, that on the 5th March, 1856, in their presence, defendant promised to marry plaintiff in ten days, in order to induce her to sign a paper, which he had prepared, instructing the circuit clerk to dismiss certain proceedings under the bastardy act, which she had instituted against him; that he repeated the promise after the plaintiff had signed the paper; that the plaintiff several times prepared her clothes, in anticipation of the marriage, and that the defendant always failed to come. It appeared that the plaintiff had given birth to an illegitimate child, or or about the 1st March, 1854, and had instituted proceedings under the bastardy act against the defendant as its

putative father; and the circuit court allowed the plaintiff, against the defendant's objection, to read the record of these proceedings as evidence to the jury; but afterwards instructed the jury, "that they were not to consider the record and papers in the bastardy case as evidence to prove the promise of marriage, or any issue in the cause." The circuit court also allowed the plaintiff, against the defendant's objection, "to introduce her child for the inspection of the jury, in order to prove, by its alleged resemblance to the defendant, that said child was begotten by him; but there was no other evidence before the jury, tending to prove that the defendant was the father of said child." The plaintiff adduced evidence, "tending to show that, until her acquaintance and association with the defendant, her character was good;" while the defendant's evidence tended to show, "that her character for chastity was bad, before and after the promise of marriage testified to by plaintiff's sisters, and before ever he became acquainted with her." The defendant read in evidence the deposition of Dr. Vaughn, a practicing physician, who testified, that he attended and prescribed for plaintiff, in 1849, when she was infected with a venereal disease; "and there was no evidence tending to show that defendant, before he made such alleged promise, had any knowledge or information of her condition as testified to by Dr. Vaughn, or that she had any venereal disease." The defendant reserved several exceptions to the rulings of the court on the evidence, which the decision of this court renders it unnecessary to state at greater length.

The circuit court charged the jury, among other things:

"2. That if they should find, from the evidence, that the defendant had promised to marry the plaintiff, and that there had been a breach of that promise, and that this action was commenced within twelve months from said breach, then they must find for the plaintiff."

"3. That if they believed the testimony of the plaintiff's sisters," as to the defendant's conduct and declarations on the 5th March, 1856, "and that the plaintiff

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assented to the proposition then made by him, then there was a contract of marriage between the parties; and that if the defendant afterwards failed and refused to marry the plaintiff; this was a breach of said contract on his part."

The defendant excepted to these charges, and requested the court to instruct the jury—

"1. That if the defendant committed fornication with the plaintiff, and got a bastard child by her, and if she has been wronged in so doing, the law has provided proper remedies for such wrongs; but the jury can give no damages in this case on account of such acts, if they were committed before the 1st January, 1855, if the contract relied on was made on the 5th March, 1856.

"2. That if the plaintiff committed fornication with the defendant, and had a bastard child by him, before the 1st January, 1855, the jury may consider that fact in mitigation, but not in aggravation, of the damages arising from the breach of any promise subsequently made.

"3. That if they believed the plaintiff had committed fornication before the defendant's promise was made, and that fact was unknown to him when he made the promise, he had the right to refuse, on that account, to marry her; and, in such case, they must find for the defendant.

"4. That if they believed, from the evidence, that the plaintiff had a venereal disease before the defendant made the promise, and that fact was then unknown to him, he had the right to refuse, on that account, to marry her; and, in such case, they must find for the defendant."

The court refused each of these charges, and the defendant excepted to their refusal; and he now assigns as error all the rulings of the court to which he reserved exceptions.

LOMAX & PRINCE, and WM. M. BROOKS, for appellant.

L. W. GARROTT, *contra*.

R. W. WALKER, J.—[Feb. 15, 1861.]—It has been much questioned, whether, in an action to recover dam-

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ages for the breach of a promise of marriage, damages for seduction may be recovered. It has been distinctly held in Kentucky and Pennsylvania, that in such action seduction cannot be given in evidence in aggravation of the damages.—*Weaver v. Bachert*, 2 Barr, 80; *Burks v. Shain*, 2 Bibb, 341; see, also, *Perkins v. Hersey*, 1 R. I. 493. On the other hand, the rule adopted in Massachusetts, New York, and several other States, is, that where seduction has been practiced under color of a promise of marriage, the jury may consider it to aggravate the damages in an action on the contract.—*Paul v. Frazier*, 3 Mass. 73; *Whalen v. Layman*, 2 Blackf. 194; *King v. Kersey*, 2 Carter, 402; *Tubbs v. Vankleek*, 12 Ill. 446; *Wells v. Padgett*, 8 Barb. 328; *Green v. Spencer*, 3 Miss. 818; *Conn v. Wilson*, 2 Overton, 233.

Mr. Parsons suggests, that damages for seduction should be excluded, where the plaintiff was in actual or constructive service, or lived in a state in which the statute law gave her an action for the seduction; and not otherwise.—1 Parsons Contr. 553.

But we need not consider this question in the present case. It is very clear that, if seduction can ever be allowed to aggravate the damages, where the action is for breach of promise of marriage, it is only in those cases where the seduction follows the promise, and is effected by means of it. We can conceive of no principle, upon which a seduction before the promise of marriage, and which, therefore, could not have been a consequence of such promise, should be permitted to swell the damages in an action on the contract.—*Burks v. Shain*, 2 Bibb, 343; *Tubbs v. Vankleek*, 12 Ill. 447. The court erred, in refusing to give the first charge asked by the defendant.

[2.] The second charge given was erroneous. It affirms, in effect, that if there was a promise to marry, and breach of that promise by the defendant, the jury must find for the plaintiff, without regard to any testimony which had been introduced tending to justify the breach.

As the judgment must be reversed for the errors

already pointed out, we need not go into a particular examination of the other questions presented by the record. It will be sufficient for the future conduct of the cause, if we lay down some general principles which govern actions of this sort.

[3.] It is essential to the validity of a contract to marry, that the promises should be reciprocal. But, if a man makes an express offer or promise of marriage to a woman, the acceptance thereof by the latter, and the promise made by her in return, may, so far as it is necessary to be proved, in order to enable her to sustain an action against the man for a breach of his engagement, be established through the medium of her conduct and actions at the time, as well as by express words. If a man offers to marry a woman, provided she will come from America to England, or any distant part, and marry him; and the woman forthwith undertakes the journey, and is ready and willing to marry at the place appointed, this is evidence of the acceptance of the offer, and of a reciprocal promise on her part, which will enable her to maintain an action for a breach of promise of marriage.—Addison Contr. 677; Hutton v. Mansell, 6 Mod. 172; Daniel v. Bowles, 2 C. & P. 553; Wetmore v. Wells, 1 Ohio, 26; Wightman v. Coates, 15 Mass. 1.

[4.] The general rule, as to what will justify the breach of a promise of marriage, cannot be better stated than in the words of Abbott, C. J., in Irving v. Greenwood, 1 C. & P. 350. "If any man has been paying his addresses to one that he supposes to be a modest person, and afterwards discovers her to be a loose and immodest woman, he is justified in breaking any promise of marriage he may have made to her; but, to entitle a defendant to a verdict on that ground, the jury must be satisfied that the plaintiff was a loose and immodest woman, and that the defendant broke his promise on that account; and they must also be satisfied that the defendant did not know her character at the time of the promise; for, if a man knowingly promise to marry such a person, he is bound to do so." See, also, Capehart v. Carradine, 4 Strob.

42, 46; Leeds v. Cook, 4 Esp. 256; Palmer v. Andrews, 7 Wend. 144; Boynton v. Kellogg, 3 Mass. 188; Beach v. Merrick, 1 Carr. & K. 463.

[5.] It is to be inferred from what is said in Beach v. Merrick, 1 Carr. & K., (*supra*), that although a previous act of fornication by the plaintiff, which was known to the defendant when he made the promise, will be no defense to the action, still it will go to lessen the damages. See 1 Parsons Contr. 550, note (*d.*) But this proposition is denied in Butler v. Eschleman, (18 Ill. 44,) which decides, that facts of conduct or character of the plaintiff, known to the defendant at the time of the promise, can neither be set up in bar of the action, nor in mitigation of damages. However the general rule may be on this subject, we are satisfied, that if the criminal misconduct of the plaintiff was not only known to the defendant when he made the promise, but had been encouraged and participated in by him, he will not be heard to urge such misconduct in mitigation of the damages. Accordingly, if the plaintiff committed fornication with the defendant, before the making of the promise, that fact cannot be set up in mitigation of the damages; for that would be to permit a man to take advantage of his own fault.—See Butler v. Eschleman, *supra*; Boynton v. Kellogg, 3 Mass. 189.

Judgment reversed, and cause remanded.

BELL vs. BELL'S ADM'R.

[DETINUE FOR SLAVERS, BY WIFE'S AGAINST HUSBAND'S ADMINISTRATOR.]

1. *Adverse possession between husband and wife; prescription.*—At common law, the possession of personal property by the wife, during coverture, is the possession of the husband, and cannot ripen into a perfect title in her, as against the husband's administrator, al-

though it is shown that the husband had abandoned her when her possession commenced; that he never afterwards returned to her, and never asserted any claim to the property; and that she held and claimed it, as her own individual property, for a continuous period of more than twenty years.

APPEAL from the Circuit Court of Wilcox.

Tried before the Hon. JOHN K. HENRY.

THIS action was brought by the administrator of Mrs. Lucy Bell, deceased, against William C. Bell, to recover certain slaves, which the defendant held and claimed as the administrator of George W. Bell, deceased, who was in his life-time the husband of the plaintiff's intestate; and was commenced on the 10th March, 1858. The case was before this court at its June term, 1860, and may be found reported in 36 Ala. 466-82. The facts in proof on the second trial, as set out in the bill of exceptions, were substantially the same as on the first trial, and may be thus stated: George W. and Lucy Bell were married, in this State, in the year 1816, said Lucy being then the widow of John Raiford, deceased; and they lived together as man and wife, in Clarke county, until 1821, 1822 or 1823, (the witnesses could not recollect the precise time,) when Bell left his wife and family, and went to Mobile, where he continued to live until his death, which occurred in the year 1843. In 1823, 1824, or 1825, (two or three years after her abandonment by her husband,) Mrs. Bell removed to Wilcox county, carrying her five children (three by Raiford, and two by Bell) with her; and she continued to reside there until her death, in 1855, supporting and educating her children without any assistance from her said husband. In 1826, or 1827, Mrs. Bell received from the administrator of John Raiford's estate, as her distributive share of the estate, a negro woman named Linda, who, with her increase since that time, is the subject of controversy in this suit; and these slaves continued in the uninterrupted possession of Mrs. Bell, who claimed them as her own individual property, and exercised all the ordinary acts of ownership over them,

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up to the time of her death. Letters of administration on the estate of George W. Bell were granted to the defendant on the 4th October, 1855, (whether before or after the death of Mrs. Bell, the record nowhere shows,) and he soon afterwards took possession of the slaves, claiming them as a part of his intestate's estate, and returned them as such in his inventory. Letters of administration on the estate of Mrs. Lucy Bell were granted to the plaintiff on the 17th December, 1855.

"On the foregoing evidence, the court charged the jury, that if they believed, from the evidence, that the plaintiff's intestate, Mrs. Lucy Bell, received the slaves sued for from the administrator of her former husband, as her distributive share of said estate; and that the defendant's intestate, George W. Bell, at and before that time, had abandoned his wife, the said Lucy, and never lived with her any more; and that the plaintiff's intestate retained the said slaves in her undisturbed possession for a period of more than twenty years before her death, and up to and after the death of her said husband, without any claim to them being set up on his part; and that the plaintiff's intestate, during this whole period of twenty years possession, had the entire and undisturbed control of said slaves, exercising acts of ownership over them, and openly and notoriously claiming them as her own individual property all the time,—then the law would raise the presumption from these facts, if unexplained, that she acquired the property in such way as to prevent the marital rights of her husband from attaching, and to vest the property in her to the exclusion of her husband's marital rights; and this, notwithstanding said George W. Bell died before the twenty years possession had elapsed, and there was no administrator on his estate until after the twenty years possession had elapsed."

The defendant excepted to this charge, and requested the court to instruct the jury, "that, if they believed all the evidence, they must find for the defendant;" which charge the court refused to give, and the defendant excepted to its refusal.

The charge given, and the refusal of the charge asked, are now assigned as error.

BYRD & MORGAN, with L. S. LUDN, for appellant.—The doctrine of prescription is founded on the presumption of acquiescence in the assertion of a hostile claim, and requires an adverse possession to support it.—Cockrell v. Brown, 33 Ala. 88; Roundtree v. Brantley, 34 Ala. 544. But there can be no adverse possession between husband and wife. At common law, the possession of the wife, during coverture, is the possession of the husband, and cannot become antagonistic to his rights. There can be no presumption of acquiescence on his part in the assertion of a hostile claim by the wife, because he has no remedy by action against her. To say that he has a remedy by simply asserting his marital rights; and that his failure to assert them during coverture shows an abandonment of them, is, in effect, to make the wife's title depend, not on the doctrine of prescription, but on the husband's desertion of her, which, as was decided on the former appeal, can have no such effect.—36 Ala. 466.

D. W. BAINE, *contra*.—Adverse possession, in its technical sense, is not a necessary ingredient of a title by prescription. If it were, the doctrine of prescription would be entirely useless and meaningless, since the title would, in every case, be complete, under the shorter statute of limitations, (six years where personal property is in controversy,) long before the prescription could be invoked. The doctrine of presumption, asserted by the charge of the court below, is something more than the old common-law prescription, and more than a statute of limitations. These latter barred the remedy, and operated on the title only in that way. But the doctrine of prescription is intended to apply to cases to which those statutes do not extend, as is clearly shown by the extract from Sims v. Aughtery, (4 Strob. Eq. 103,) cited in McArthur v. Carrie's Adm'r, 32 Ala. 22. It requires for its application a possession under a claim of right, inconsistent

with, and hostile to, the claim sought to be barred; and this is the true test, as established by many analogous decisions.

Thus, it has been held, that an administrator, who makes an illegal and void sale of the property of the estate, is estopped by his own act from suing for the property; and that the statute of limitations does not begin to run in favor of the purchaser, as against the estate, until the appointment of a succeeding administrator; in other words, that the purchaser cannot be considered as holding adversely, in the strict technical sense of the term, until there is some one who has a right to sue.—*Pistole v. Street*, 5 Porter, 14; *Hopper v. Steele*, 18 Ala. 828; *Lay v. Lawson*, 24 Ala. 186; *Wyatt's Adm'r v. Rambo*, 29 Ala. 525. Yet it has been held also, in an equal number of cases, that if the purchaser holds possession for twenty years, his title will be protected by the indulgence of the presumption, that a valid authority to sell originally existed.—*Gantt v. Phillips*, 23 Ala. 275; *Lay v. Lawson*, 28 Ala. 391; *McArthur v. Carrie*, 32 Ala. 75; *Wyatt's Adm'r v. Scott*, 33 Ala. 317. So, it has been held, that the possession of a mortgagor or purchaser of lands cannot be adverse until the debt is paid; (*Byrd v. McDaniel*, 33 Ala. 18; *Relfe v. Relfe*, 34 Ala. 505;) yet, if such possession continues twenty years, the title becomes perfect by the presumption of payment. It is said in the case last cited, that "it would be a violation of all principle to allow the acquisition of title by the lapse of time;" yet the same result is attained by applying the doctrine of presumption,—thus clearly recognizing the difference between the two principles.—See, also, *Harvey v. Thorpe*, 28 Ala. 264; *Rhodes v. Turner*, 21 Ala. 210.

The cases above cited show, that, after the lapse of twenty years, a deed, payment, grant of administration, regular order of sale, or (to use the language of the court, in *Sims v. Aughtery*, *supra*,) "almost anything else," will be presumed, to quiet the possession. Why cannot the principle be invoked by the wife, in a case like this?

Her possession, it is true, is, technically, the possession of her husband; but in the same sense the possession of the mortgagor or purchaser is that of the mortgagee or vendor. On the facts supposed in the charge, her possession has been under claim of right, and has continued more than twenty years; and it is the duty of the courts, when asked to disturb her possession, to presume that she claimed a separate estate in the property, or anything else that will perfect her title.

A. J. WALKER, C. J.—[June 10th, 1861.]—When this case was before in this court, we announced the principle, applicable to cases governed by the common law, that the wife can not possess personal property; that her possession is the possession of the husband, and that this principle resulted from the unity of husband and wife. It is not the same principle which applies to the relation of mortgagor and mortgagee, and of landlord and tenant. In those cases, the doctrine that the possession of the one is the possession of the other, grows out of the law of estoppel. The possession of the wife is the possession of the husband, because her legal existence is merged in his, and the wife is positively incapable of a possession, in the eye of the law, distinct from that of the husband. From this principle it is an inevitable deduction, that the law deems the husband of Mrs. Bell to have been, through her, in possession of the property in controversy up to his death. This being the case, there was no antagonism of possession on the part of Mrs. Bell to her husband. It is not contended, and indeed it could not be, either upon authority or reason, that the presumption, which is drawn for the quieting of titles from the lapse of time, is permissible in the absence of any enjoyment of the right asserted antagonistical to that sought to be barred. For these reasons, we think it clear, that the possession of Mrs. Bell could never give her a title as against her husband. Suppose it were admitted, that the possession of Mrs. Bell, under a claim of title in herself, would vest her with a title; the title when derived, under the com-

mon law, would enure to the husband; and thus we would have the wife's antagonistic possession divesting the husband's title, which would by operation of law be revested in the husband.

We do not intend, in any thing we have said, to infringe the doctrine, that in equity the wife is deemed, as to her separate estate, a femme sole. It may be that, if a wife were in possession of property, claiming openly that it was conveyed to her as a separate estate, so as to exclude the husband's marital rights; and if she had continued to possess and enjoy the property, under such claim of it as a separate estate, for more than twenty years, the law would presume, against the husband, that the claim was founded on a valid conveyance creating a separate estate. In a court of equity, the wife is allowed to assert her claim to a separate estate in antagonism of her husband's rights. But those principles can not aid the charge given. It raises the presumption, not upon the fact of the long-continued assertion by Mrs. Bell of a claim that the slaves were conveyed to her as a separate estate, but upon the fact that she was deserted by her husband, and claimed and possessed the slaves "as her own individual property." There is a clear distinction between the claim of a separate estate, created in such a manner as to exclude the husband's marital rights, and a naked claim of title in the wife against the husband. A wife may claim that a separate estate was vested in her. She can not claim that she holds property in possession adversely to her husband, except upon the ground that it is a separate estate; for her possession, except so far as chancery recognizes her right to hold a separate estate, and confers upon her, in reference to such estate, the privileges of a femme sole, is the possession of the husband. The possession by Mrs. Bell, claiming that the slaves belonged to her, and that she held them adversely to her husband, no matter how long, could never avail. An adverse possession, or an antagonistic enjoyment, for twenty years, may create the presumption of a title in favor of persons *sui juris*. It never can create the presump-

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tion of a title in the wife clothed with the quality of an exclusion of the husband's marital rights. If the absurdity could be conceived, of a wife's holding adversely to her husband, what reason or authority is there to support the position, that she thereby not only acquired a title, but a title of such a character as to exclude the husband?

There was no evidence conducing to show that Mrs. Bell ever claimed to hold the slaves under any conveyance which created a separate estate. The court, therefore, erred in refusing the charge asked by the defendant, as well as in the charge given.

Reversed and remanded.

WATT'S ADM'R vs. WATT'S DISTRIBUTEES.

[FINAL SETTLEMENT OF ADMINISTRATOR'S ACCOUNTS.]

1. *Conclusiveness of final decree.*—A decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of the administrator of an insolvent estate, and ascertains the amount of assets which had come to his hands, the amount of his disbursements, and the balance left in his hands for distribution among creditors; and by which "it is ordered, adjudged, and decreed," that the account, as stated by the court, "be received, passed, allowed, recorded and filed as a final settlement of said estate,"—is final and conclusive, until reversed by the proper tribunal, and can not be reviewed or annulled by the probate court at another term.
2. *Requisites of final decree.*—A decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of the administrator of an insolvent estate; which corrects certain supposed errors and mistakes in a former settlement, thereby showing a larger balance in the administrator's hands for distribution among the creditors, and declares the former settlement to be partial only; and by which "it is considered and decreed," that the claims allowed on the former settlement, which were then declared entitled to a dividend of eighty per cent., "be paid in full, and that whatever sums shall remain,

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after the satisfaction of said allowed claims, be equally divided among the four minor heirs of" the decedent,—has not the requisites of a final decree, and will not support either an execution or an appeal.

APPEAL from the Probate Court of Sumter.

IN the matter of the estate of George L. Watt, deceased, on final settlement of the accounts and vouchers of Joel Watt, the administrator. The citation was issued on the 12th March, 1860. The administrator appeared at the ensuing April term, and moved the court to dismiss the proceeding, on the ground that the estate had been declared insolvent in September, 1855, and that he had made a final settlement of his administration on the 17th January, 1857; and, in support of his motion, offered in evidence the decrees rendered by said probate court at those times. "After hearing the evidence, and the argument of counsel, the court overruled said motion; whereupon the defendant excepted. The court then proposed to set aside and vacate so much of the said decree of January 17, 1857, as declared said settlement to be final; to which action of the court the defendant objected. The court overruled the objection, vacated so much of said decree as declared said settlement to be final, and proceeded to state an account in accordance with the citation; to which the defendant excepted."

The decree of January 17, 1857, and the decree from which this appeal was taken, are in the following words:

"January 17, 1857. This day came up for final action and decree, in pursuance of a former order of this court, and after advertisement for three successive weeks in the *Sumter Democrat*, the account-current and vouchers of the administrator for a final settlement of his administration of the estate of George L. Watt, deceased; which, upon examination, shows a receipt of assets to the amount of \$194 23, and disbursements, properly vouched, to the amount of \$355 40; leaving a balance of \$1585 88 for distribution among the creditors of said estate. And it ap

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pearing that said account is legally and fairly stated, and properly vouched, it is ordered, adjudged, and decreed, that the same be received, passed, allowed, recorded and filed as a final settlement of said estate. After a careful examination, the following claims were rejected and disallowed, for want of legal proof of their correctness," (specifying them.) "It is ordered, that said estate pay eighty per cent. on the claims filed and allowed against said estate."

"Probate Court of Sumter, April term, 1860.

"This day came up for action and decree, in pursuance of an order made at the March term, 1860, the account stated by this court, under section 1817 of the Code of Alabama, against Joel Watt, administrator of the estate of George L. Watt, deceased; and notice having been issued and executed upon said Joel Watt, requiring him to file his account-current and vouchers for a final settlement on this day, and notifying him that, if he failed to file them, the court would pass the account heretofore stated against him; the said Joel Watt came into court, and moved to dismiss said proceedings against him, because the citation was issued *ex mero motu*; because said estate was declared insolvent, and final settlement of it made in January, 1857; because the court has no jurisdiction over the matter, and because neither the creditors nor the heirs of said deceased are parties to the proceeding. The court overruled said motion; and the said Joel Watt refusing to file his account-current and vouchers for a settlement, the court proceeded to examine and pass the account heretofore stated against him. The account thus stated by the court against the said administrator, charges him with the following assets, which are shown to have come into his possession, and not to have been accounted for or distributed by him, and which were totally omitted in his former settlement—to-wit," &c.; specifying assets to the amount of \$1350 99. The decree then allows credits to the administrator, amounting to \$223 48, and proceeds thus—"And it appearing to the

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satisfaction of the court, that the said amount (\$1350 99) charged against said administrator as aforesaid, came into his possession as such administrator; and that he omitted to account for, or charge himself with said sum, in his settlement made on the 17th January, 1857; and that only \$223 48 of said sum has been disbursed on behalf of the estate, the creditors, or the heirs-at-law; and it further appearing to the court, that the omission of the administrator to charge himself with the amount of said account of sales and inventory, in conformity with the first subdivision of section 1802 of the Code, as well as his failure to distribute the same, renders void the decree made on the settlement of January 17, 1857,—it is now therefore considered, ordered, and decreed by the court, that so much of said decree as declares the said settlement of January 17, 1857, to be final, be, and the same is hereby, so amended and altered as to make the same—what it was in fact—a partial settlement and distribution of said estate, and to render the said Joel Watt, administrator of said estate, accountable to this court for the goods, chattels and moneys of his intestate, which he is shown to have omitted charging himself with in his account passed upon the 17th January, 1857. It is also considered and decreed by the court, that the claims which were allowed by this court in the settlement of 17th January, 1857, be paid in full, and that whatever sum shall remain, after the satisfaction of said allowed claims, be equally divided among the four minor heirs of the said George L. Watt, deceased; and it appearing to the satisfaction of the court, that said administrator has overpaid several of the creditors heretofore, by reason of the rejection of their claims, it is considered and decreed, that he retain, in all such cases, whatever may be still due them on their allowed claims, to reimburse him for said payments on claims that were rejected. It is further ordered, that the judgments on execution docket No. 10, in favor of the creditors and heirs-at-law of the said George L. Watt, be, and the same are hereby, made a part of this record, and that executions may issue on said

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judgments, for the amounts due said creditors and heirs-at-law respectively. It is further ordered, that in order to make up a complete record of the said case, the inventory, account of sales, and settlement made on the 17th January, 1857, be, and the same are hereby, made a part of the record in this case."

The overruling of the motion to dismiss the proceedings, and the decree rendered by the court, are now assigned as error by the administrator.

COLEMAN & VAN DEGRAFF, for appellant.

STONE, J.—[July 11, 1861.]—In January, 1857, a final settlement was had of the administration of appellant on the estate of George L. Watt, deceased. Thus the matter rested for three years, when these proceedings were set on foot to bring the administrator to another settlement; and in such new proceedings, the attempt was made to hold the appellant accountable for other assets of the estate, which, it is alleged, were in his hands at the time of the first settlement, and were not accounted for. To these proceedings the administrator interposed as a bar the decree on the former final settlement. This defense the probate court overruled, and thereupon vacated the former judgment as a final decree, and pronounced it to be only a partial settlement.

On what evidence the probate court acted in vacating the former decree in part, and rendering a new one, we are not informed. It is obvious that the record did not furnish evidence that there had been any clerical error in the matter of entering up the decree which the court in fact made. On the contrary, it is clear that the judicial mind did pass and pronounce on the question of the amount of assets in the administrator's hands, and announced the result. It is also clear that the probate court did decree and determine that the settlement then made was—what it purported to be—a final settlement. "A decree rendered under such circumstances, is binding

on the parties to it, until it is reversed in the proper court; and the court rendering it has no power to review or annul it."—*Barnett v. Tarrence*, 28 Ala. 467; *Allman v. Owen*, 31 Ala. 167; *Moore v. Lesueur*, 33 Ala. 243; *Norman v. Norman*, 3 Ala. 389; *Duke v. Duke*, 26 Ala. 675-6; *Simmons v. Price*, 18 Ala. 406; *Matthews v. Douthitt*, 27 Ala. 276; *Cannon v. Rogers*, at this term; *King v. Smith*, 15 Ala. 269; *Landreth v. Landreth*, 12 Ala. 640; *Morrison v. Morrison*, 3 Stew. 444; *Butler v. Ins. Co.*, 14 Ala. 793; *Perkins v. Moore*, 16 Ala. 12.

Although it may be, and probably is true, that in the settlement of January, 1857, there was a failure to charge the appellant with certain assets of the estate in his hands; yet the final decree then rendered must forever close the door to a re-investigation of that question, in that court. That there must be an end of litigation, and that the sanctity and inviolability of the judgments of the courts having competent jurisdiction are of infinitely greater importance than the complete justice of an individual case, are propositions vindicated alike by reason and by authority.—1 Greenl. Ev. § 522; *Bohe v. Stickney*, 36 Ala. 482.

[2.] We have said thus much on the merits of this case; and from the principles above announced, it is manifest that, in the proceeding of the probate court of Sumter since January, 1857, that court has mistaken its powers. It should vacate all orders it has made, in what we have characterized as the renewed proceedings. But, under these later proceedings, there does not appear to have been any final decree rendered. True, the principles of a decree are laid down; but no judgments were rendered, ascertaining any amounts due to the various persons,—the distributees in particular; nor, indeed, are the names of the distributees mentioned in the record. The balance is not ascertained, and the persons between whom the money is to be divided, are described simply as "the minor heirs of said George L. Watt, deceased." Nothing has been done which placed the case in a condition for collection, or for the issue of executions for the collection

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of the amount. That is not a money judgment, which does not authorize the issue of an execution; and no execution could issue for these unascertained balances. The judgments, to be final, should have been specific, and in favor of the several distributees by name.—*Brazeale v. Brazeale*, 9 Ala. 491; *Merrill v. Jones*, 8 Por. 554; *Betts v. Blackwell*, 2 S. & P. 373; *Judge of Limestone v. French*, 3 S. & P. 263; *Hollis v. Caughman*, 22 Ala. 478; *Harrison, ex parte*, 7 Ala. 739; *Andrews v. Hall*, 15 Ala. 88.

There being no final decree in the matter of the renewed proceedings, the appeal must be dismissed.

CRYMES vs. WHITE & JOHNSON.

[ACTION ON OPEN ACCOUNT FOR GOODS SOLD AND DELIVERED.]

1. *Discovery at law.*—Where interrogatories are propounded to the defendant in an action at law, (Code, §§ 2330–86,) for the purpose of disproving the defense which he sets up, he may accompany his admission of the particular facts called for by the interrogatories with a statement of additional facts in avoidance of them; as where he pleads payment, in an action on an open account due to a partnership, and is asked if the payment was not made to one of the partners alone, in debts due to him from that partner individually, he may state, in connection with his admission of that fact, that the payment was made after the other partner had sold out his interest in the firm, and while the partner to whom it was made was the sole owner of the goods, accounts, &c.
2. *Proof of correctness of demand by plaintiff's own oath.*—In an action by late partners, on an open account due to the partnership, the defendant having introduced evidence tending to show that, after the dissolution of the firm, he had paid the account to one of the partners, who had bought out the interest of his co-partner, by crediting the amount on debts due to him from that partner individually, the other partner cannot be allowed to testify, (Code, § 2318,) in rebuttal, that the partnership was not dissolved when said payment was made.

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APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by the appellees, suing as late partners, and was founded on an open account for goods, wares and merchandize, sold and delivered to the defendant during the years 1853 and 1854. The defendant pleaded, "that he is not indebted to the said firm of White & Johnson, as the plaintiffs have above complained," &c.; and issue was joined on that plea. The only matter in controversy on the trial was the validity of certain payments made by the defendant to the plaintiff Johnson; and the only questions presented for revision in this court, relate to the rulings of the circuit court on the admissibility of evidence touching that matter. The material facts are stated in the opinion of the court.

GUNN & STRANGE, for appellant.

CLOPTON & LIGON, *contra*.

R. W. WALKER, J.—[July 3, 1861.]—1. The plaintiffs propounded interrogatories to the defendant, under the statute. The defendant had interposed the plea of payment; and the plaintiffs, with the view of meeting this defense, among other questions, inquired of the defendant, with whom, and at what time, he had settled the accounts sued on, how much of the same he had paid in money, and how much was paid in individual debts due from Johnson, one of the plaintiffs, to the defendant. The defendant, in answering, stated, that he had settled the accounts sued on with the plaintiff Johnson; that he had paid the same partly in cash, and partly in medical accounts due from Johnson to him; and in reference to the account of 1853, he adds: "Defendant made said payments, and said credits were made, after said White had sold out his interest in the concern of White & Johnson, and while Johnson was the sole owner of the goods, notes, books of account, &c." On motion of the plaintiffs, this part of the defendant's answer was suppressed

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by the court. Giving to the sections of the Code (§§ 2830-8) authorizing the examination of parties by interrogatories, the same construction which was put upon the old statute on that subject, (Clay's Digest, 341, § 100,) we must hold, that the court erred in suppressing that portion of the defendant's answer above quoted. According to our former decisions, interrogatories under the statute are governed by the same rules that apply to bills of discovery in chancery, so far as relates to the nature of the discovery sought, and the effect of the answers as evidence when made. In *Saltmarsh v. Bower*, (22 Ala. 221,) this subject underwent a careful consideration; and it was there held, that, as in an answer to a bill of discovery, nothing can be considered impertinent, which tends to disprove the existence of the cause of action or defense set up in the bill; so an answer to interrogatories under the statute, whether it is purely responsive, or contains affirmative irresponsible allegations in avoidance of the demand, cannot be made the subject-matter of exception. See, also, *Pritchett v. Munroe*, 22 Ala. 501; *Wilson v. Maria*, 21 Ala. 359. In the present case, the plaintiffs sought to elicit from the defendant the fact, that all of the payments he relied on had been made to Johnson, and that in part they were made by discharging the individual indebtedness of Johnson to the defendant. According to the principle settled in the cases cited *supra*, the defendant was not bound to confine himself to a simple admission or denial of the facts thus sought to be elicited. If he admitted the facts to be as indicated by the interrogatories, he had the right to accompany that admission with such an explanation of them as the justice of the case required. He had the right to confess and avoid. His admission that he had paid the accounts to Johnson, in individual debts of the latter to him, would, if unexplained, have deprived the payment of all value as a defense to this suit; and he had the right to accompany his admission of that fact with the statement of such other facts as showed that the payment operated a legal discharge of the demand.

2. The defendant introduced evidence tending to show that the plaintiff White had sold out his interest in the goods, notes, books of account, &c., of the firm, to his partner, Johnson; and that, after this sale, the defendant had paid the accounts sued on to Johnson, by crediting the same on individual debts due from Johnson to the defendant. It appears that, after the introduction of this evidence, the plaintiff White was offered as a witness under the statute, to prove the correctness of the demand sued on, the requisite notice having been previously given. On his examination, he was allowed to state, that the co-partnership of White & Johnson had not been dissolved; that he had made no sale to Johnson; that Johnson had no authority to settle the books by any individual debt of his due the defendant; and that he was a co-partner with Johnson, and interested in the goods sold in 1853 and in 1854, and in the books. It was not the design of section 2813 of the Code, under which the plaintiff was introduced, to make the parties general witnesses.—*Waring v. Henry*, 86 Ala. 124. All that the plaintiff is competent to establish, is the correctness of the demand. It is true, as was held in *Jordan v. Owen*, (27 Ala. 155,) that the plaintiff cannot be permitted, under this section, so to shape the facts, which he proposes to prove by his own oath, as to deprive the defendant of the right to prove by his oath that the demand has been paid. In cases falling within this section, 'the correctness of the demand' must be regarded as not proved by the plaintiff's oath, unless he swears that it has not been paid. Hence, he must not only state facts which, if proved by other witnesses, would make out a *prima-facie* case of indebtedness of the defendant to him, but he must go further, and swear to the fact of non-payment of the indebtedness. But where, as in this case, the defendant sets up, as a defense to the action, a payment not made to the plaintiff; and the validity of such payment as a defense, depends upon an alleged previous transfer of the claim to the person to whom the payment was made, it is not allowable for the plaintiff to testify in rebuttal of the evi-

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dence of transfer offered by the defendant. If the plaintiff was permitted to contradict the evidence offered by the defendant, of an independent fact of this sort, it would be difficult to fix any limit to his right to testify in the case. It is obvious, that the testimony of the plaintiff—that the partnership was not dissolved, that he had made no sale to Johnson, and that the latter had no authority to settle the books by any individual debt of his due the defendant—was not evidence necessary or proper to establish the correctness of the demand, in the first instance, and was irrelevant, except so far as it went to disprove the alleged transfer to Johnson, or the validity of the defendant's payment to him. In any aspect, it was strictly rebutting proof; and we hold, that the court erred in permitting the plaintiff to testify to the facts above mentioned.—See, further, *West v. Brum*, 35 Ala. 263; *Flash, Hartwell & Co. v. Ferri*, 34 Ala. 186; *Beaumont v. Armistead*, 8 Ala. 507; *Kirkman v. Eaton*, 35 Ala. 272.

Judgment reversed, and cause remanded.

LAWRENCE vs. WARE.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *Conclusiveness of judgment as bar.*—Where a promissory note, which had been transferred by delivery, was placed by the transferee in the hands of an agent, with instructions to present it to the maker for payment, and, if payment was refused, to put in the hands of an attorney, for collection by suit; and, payment having been refused, the agent sent the note to an attorney, who, not being informed of the name of the real owner, brought suit on it in the name of the agent, and the action was successfully defended, on the plea of set-off against the payee,—*held*, that the judgment in that action was not a bar to a subsequent action on the note by the owner, who was not shown to have had notice of the pendency of that action.

Lawrence v. Ware.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. WM. S. MURR.

THIS action was brought by Noah Lawrence, against Horace Ware; was founded on the defendant's promissory note for \$87 87, dated 25th May, 1854, and payable on the 1st January, 1855, to Matthew Lee or order; and was commenced on the 3d August, 1858. The defendant pleaded a former judgment on the note, in his favor; and issue was joined on that plea. On the trial, as the bill of exceptions states, after the plaintiff had read in evidence the note on which the suit was founded, the defendant offered in evidence the record of the suit on which he relied as a bar. That suit was brought in the name of one L. Vandever as plaintiff, and against the defendant in this case; was founded on the same promissory note which is the foundation of the action in this case; and judgment was rendered, on the 11th March, 1858, on the verdict of a jury, in favor of the defendant; but the record does not show what pleas were interposed. "It was admitted, that on the trial of that suit, under the plea of set-off, the defendant proved, that he had employed Matthew Lee, the payee of said note, to transport a large quantity of pig-iron for him, in flat-boats, down the Coosa river to Wetumpka; that said iron was sunk in the Coosa river, in consequence of said Lee's failure to perform his duties in reference to the transportation, and was thereby wholly lost to the defendant, and that the value of said iron was greater than the amount of the said note. It was admitted, also, that the only issue tried in that suit was the validity and sufficiency of the said set-off, and that the jury found their verdict for the defendant on that issue. It was admitted, also, that Lawrence, the plaintiff in the present suit, held said note by transfer from said payee by delivery, and that said transfer was for a valuable and sufficient consideration. It was proved by said Vandever, on the trial in this case, that said plaintiff (Lawrence) delivered said note to him, and requested him to call on Ware, collect the money, and, if paid, send the

money to him; that said witness called on defendant for the money, who failed and refused to pay the same; that he then informed plaintiff, who resided in Calhoun county, of the defendant's failure to pay the note, and was instructed by him to place it in the hands of an attorney, for collection by suit; that, being unacquainted with any attorney in Shelby county, he handed said note to one Moore, to be delivered by him to an attorney, but did not tell said Moore to whom said note belonged; and that he (witness) had no interest in said note, and had no knowledge that the suit had been brought in his name until after the same had been tried. It was admitted, that the suit was brought by the attorney in the name of said Vandever, because he was informed that it was sent by him, and the name of no other owner was disclosed."

On the facts above stated, the plaintiff proposed to prove, "that the alleged set-off, proved by the defendant on the trial of the former suit, was unjust, untrue, and improperly allowed; that the defendant sustained in fact no loss or damage in consequence of the sinking of the iron in the river; that the alleged contract with said Lee, for the transportation of the iron, was made after the defendant had notice of the transfer of said note by Lee to said plaintiff; and that said note was in fact given for a debt due from said defendant to plaintiff, (except a small balance due from said defendant to Lee,) and was so given because said Lee informed defendant that he would deliver the note to plaintiff." The court excluded this evidence, and charged the jury, "that, if they believed the evidence, they must find for the defendant." The plaintiff excepted to the ruling of the court in excluding the evidence offered by him, and to the charge to the jury; and he now assigns the same as error.

S. LEIPER, for appellant.

MARTIN & HEFLIN, *contra*.

A. J. WALKER, C. J.—[June 7, 1861.]—The general principle is, that judgments and verdicts are only binding

on parties and privies. The plaintiff in this suit was neither a party nor privy to the former suit which is pleaded in bar. With the person in whose name the former suit was brought, the plaintiff occupied no relationship, in reference to the property in the note, which would constitute privity.—1 Greenleaf on Evidence, §§ 189, 523. The only relationship which existed between them, was that of a temporary agency on the part of the plaintiff in the former suit, to demand payment of the note, and, in default of payment, to deliver it to an attorney for collection.

It was decided in *Mayer v. Faulkrod*, (4 Wash. C. C. 503,) that where the suit was brought in the name of an improper plaintiff, and a recovery had, and payment made, there being no collusion, the payment would constitute a defense to an action by the true owner of the cause of action. But that decision is put expressly upon the ground of a payment made by the legal and compulsory sentence of a competent tribunal; and it is admitted that, in the absence of such payment, the former judgment would be no defense. Besides, the correctness of that decision is doubted.—2 Part Cow. & Hill's Notes to Phil. Ev. (3d ed.) 167.

It is true that the court will always inquire who are the real parties, in determining whether a former judgment is a bar. But there is nothing in the record in this case, which authorizes the inference that the plaintiff was the real party in the former suit. The other suit was, as to him, *res inter alios acta*. He had no right to control the proceedings in the case, or to produce or cross-examine witnesses, or to appeal; and it does not at all appear that he participated in conducting it, or even knew of its existence.

Reversed and remanded.

CLEVELAND *vs.* POLLARD.

[BILL IN EQUITY TO SUBJECT SEPARATE ESTATE OF MARRIED WOMAN TO PAYMENT OF DEBT.]

1. *Sufficiency of service.*—Where one of the defendants was described in the original bill as Charles T. Cleveland; and the sheriff returned the subpœna “executed on Charles H. Cleveland, and Charles T. Cleveland not found”; and the bill was afterwards amended by substituting H. for T. as the initial letter of the middle name,—*held*, that the service was sufficient, and that the variance was, at most, an immaterial misdescription.
2. *Contract between trustee and cestui que trust.*—To subject a married woman’s separate estate, created by deed or will, to the payment of a debt contracted by her with her trustee, or with a partnership of which he is a member, it is not enough for the complainant to aver and prove that “the articles were furnished by her express desire, under the faith and credit of her separate estate, and were suitable and proper to her condition in life”: he must repel the imputation of bad faith, which the law casts upon him, by showing that the prices charged were reasonable, and that he made no profit by the transaction.

APPEAL from the Chancery Court of Russell.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by Charles T. Pollard, Samuel G. Jones, and William C. Yonge, as partners and joint owners of the “Chewacla Lime Works,” against Mrs. Elizabeth E. Cleveland, Charles T. Cleveland, her husband, and William C. Yonge, her trustee; and sought to subject Mrs. Cleveland’s separate estate, held under the will of her deceased father, to the payment of a debt contracted by her with the complainants. It alleged, that the complainants had furnished lumber, lime, and other materials, and had advanced money, towards the construction of a dwelling-house on a lot belonging to Mrs. Cleveland; that “they also furnished to her, by her express desire, during the years 1855, 1856, and 1857, vari-

ous articles suitable and proper to her condition in life, and advanced various sums of money to her, and for her benefit, in the same way, and all under the faith and credit of her said separate estate"; and that said separate estate consisted of two slaves, a tract of land containing about eighty acres, and a four-acre lot on which her dwelling-house was situated. In the original bill, Mrs. Cleveland's husband was described as Charles T. Cleveland; but, the sheriff having returned the subpœna "executed on Charles H. Cleveland, and Charles T. Cleveland not found," the bill was afterwards amended, by substituting H. for T. as the initial letter of his middle name.

Decrees *pro confesso* were entered against all the defendants, in default of their appearance; and at the ensuing term, the cause having been submitted for decree, the chancellor held the complainants entitled to relief, and ordered a reference to the master, to ascertain and report the amount of the complainants' debt, the value of Mrs. Cleveland's separate estate, in what it consisted, and what part of it could be sold with least detriment to her interests. At the next term, after the master's report had been made, the defendants Cleveland and wife submitted an application to set aside the decree *pro confesso* against them, and for leave to file an answer; and their application was supported by several affidavits. The chancellor overruled the application, but without prejudice to a renewal of the application by Mrs. Cleveland alone; and afterwards overruled her application, founded on new affidavits, confirmed the master's report, and ordered a sale of a part of her separate estate, unless the complainants' debt was paid by a given day.

It is now assigned as error—1st, that the bill ought to have been dismissed, for want of equity; 2d, that the decrees *pro confesso* ought to have been set aside, and the defendants been allowed to file answers; and, 3d, that the final decree is erroneous.

CHILTON & YANCEY, and WM. P. CHILTON, JR., for appellants.

GEO. D. HOOPER, with GOLDTHWAITE, RICE & SEMPLE,
contra.

STONE, J.—[June 6, 1861.]—The point made on the sufficiency of the service on Mr. Cleveland, must, we think, be overruled. We do not doubt that the true party was served with subpœna; and hence we disregard that portion of the sheriff's return, which affirms that "Charles T. Cleveland [was] not found." The variance is, at most, a misdescription of the initial letter of Mr. Cleveland's middle name. Under the principle ruled in *Edmundson v. The State*, (17 Ala. 180,) such misdescription is immaterial.—See *Lynes v. State*, 5 Por. 236.

The view we take of a question after considered, renders it unnecessary that we should say much on the subject of setting aside the decree *pro confesso*. The chancellor attained the conclusion, that the defendants had betrayed great want of diligence; and we are of the same opinion.

We have not been referred to any adjudged case, nor have we found any, which is precisely like the present. This is not the case of a sale of trust property by a trustee to himself, nor of a purchase of the trust estate by the trustee from the *cestui que trust*. If such were the facts of this case, the law applicable to it is well defined. See *Thompson v. Lee*, 31 Ala. 304-5, and authorities cited; *Hill on Trustees*, 157-8; *Story's Eq. Jur.* §§ 321-2.

The bill in this case, in effect, charges that the account, for the recovery of which this suit is brought, is for articles sold to Mrs. Cleveland at her instance and request. We treat the case as if the bill charged that Mrs. Cleveland purchased the goods from the complainants by express contract. The language of the bill is, "Your orators also jointly furnished the said Mrs. Elizabeth E. Cleveland, by her express desire, during the years 1855, 1856, and 1857, with various articles suitable and proper to her condition in life, and advanced various sums of money to her, and for her benefit, in the same way." But immediately in connection is found the averment, that all

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this was done "under the faith and credit of her separate estate." The plain import of this language is, that the complainants, of whom one is the trustee of Mrs. Cleveland, intended by the sale to create a charge on her trust estate. It is difficult, if not impossible, to distinguish, in principle, this transaction, from the ordinary case of a purchase of the trust estate by the trustee. "A trustee is never permitted to partake of the bounty of the party for whom he acts, except under circumstances which would make the same valid, if it were a case of guardianship. A trustee can not purchase of his *cestui que trust*, unless under like circumstances; or, to use the expressive language of an eminent judge, a trustee may purchase of his *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such, after a jealous and scrupulous examination of all the circumstances; and it is clear that the *cestui que trust* intended that the trustee should buy; and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as trustee."—1 Sto. Eq. Jur. §§ 321, 307; Fox v. Mackreth, 2 Bro. C. C. 400.

In the case of Thompson v. Lee, (31 Ala. 304,) we stated, as the result of the authorities, many of which are there cited, that contracts of parties, between whom there exists some peculiar confidential or fiduciary relation, "*are regarded, prima facie, as constructively fraudulent*;" and the *onus* is cast on the party seeking to set them up, of proving the *bona fides* of the transaction, and of repelling the imputation of bad faith and oppression which the law casts on him."—See, also, Greenfield's estate, 14 Penn. State Rep. 504, *et seq.*; Taylor v. Taylor, 7 How. U. S. 199; Hill on Trustees, 157, *et seq.*; McKnight v. Wilson, 2 Jones' Eq. 491; Puzey v. Seneir, 9 Wis. 370.

While we concede, that such a transaction as this may be upheld, if there be no bad faith or oppression on the part of the trustee; still, under the principles above declared, the *onus* rests on the trustee, who seeks to enforce such a contract, of repelling the imputation of bad faith and oppression. Applying these principles to this case,

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the bill must be pronounced defective. True, it avers that the articles were supplied to Mrs. Cleveland by her *express desire*; but it is not stated that the articles thus furnished were reasonably worth the sum charged; nor, when bought for the use of Mrs. Cleveland, does it in all cases appear that no profit or enhanced price was charged against her. All the averments of the bill may be true, and yet the charges for the various items be unreasonable. The *onus* being on the complainants, they have not brought themselves within the rule.

The decree of the chancellor is reversed, and the cause remanded.

OWSLEY vs. MONTGOMERY & WEST POINT RAILROAD COMPANY.

[ACTION FOR FOR MALICIOUS PROSECUTION, AND FALSE IMPRISONMENT.]

1. *What actions lie against corporation.*—An action of trespass for false imprisonment lies against a corporation, but an action on the case for a malicious prosecution does not.
2. *Difference between counts in case and in trespass.*—A count which avers that the defendants, "maliciously and without probable cause, sued out a warrant, commonly called a peace-warrant, against the plaintiff," is in case for a malicious prosecution; and so is a count which avers that the defendants, "recklessly and without probable cause, through their agent and servant, caused and procured a peace-warrant to be sued out," &c., "on which said warrant plaintiff was arrested, and brought before the said justice of the peace, who, on hearing the evidence advanced by the defendants, discharged plaintiff from the arrest under said warrant;" but a count which avers that the defendants, "recklessly, maliciously, and without probable cause therefor, caused the plaintiff to be arrested and imprisoned, on a charge that he had threatened to injure and destroy the lives and property of the defendants, and that plaintiff was imprisoned by defendants for ten days," &c., is in trespass for false imprisonment.

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3. *Specification of grounds of demurrer.*—A misjoinder of counts is not available on demurrer, unless specially assigned as a ground of demurrer, as required by the statute (Code, § 2253.)

APPEAL from the Circuit Court of Russell.

Tried before the Hon. NAT. COOK.

THE complaint in this case was in the following words:

<p>“George W. Owsley vs. Montgomery & West Point Railroad Company.</p>	}	<p>The plaintiff claims of the defendants the sum of two thousand dollars, as damages for maliciously and without probable cause suing out a warrant, commonly called a peace-warrant, against the plaintiff, on the 21st January, A. D. 1857. Also, the further sum of two thousand dollars, as damages for recklessly and without probable cause, through their agent and servant, one D. H. Cram, causing and procuring a peace-warrant to be sued out before one Henry M. Crowder, a justice of the peace for said county of Russell, on the 21st January, A. D. 1857; on which warrant the said plaintiff was arrested, and brought before the said justice of the peace, who, on hearing the proof advanced by the defendants, discharged the plaintiff from the arrest under said warrant on the 31st January, A. D. 1857. The plaintiff claims of the defendants the further sum of two thousand dollars, as damages for recklessly, maliciously, and without probable cause therefor, causing the plaintiff to be arrested and imprisoned, on a charge that he, the said plaintiff, had threatened to injure and destroy the lives and property of the defendants; and plaintiff was imprisoned by defendants ten days, to-wit, from the 21st January, A. D. 1857, to the 31st day of said month.”</p>
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The defendant demurred to the entire complaint, and to each count thereof separately; and assigned the following causes of demurrer: To the entire complaint—“1st, because the defendant could not swear out a peace-warrant, or act maliciously;” and, “2d, because the complaint shows no cause of action against the defendant.” To the first count—1st, “because the defendant, being an

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artificial person, if any at all, could not act maliciously, or swear out a peace-warrant against any person;" 2d, "because the said count does not show any cause of action, nor does it allege that it was sued out before any officer authorized to issue it, or that any process issued;" and, 3d, "because it does not allege that the plaintiff has been discharged, or that said proceedings against him have been terminated." To the second count—1st, "because the defendant is not responsible for the malicious act of its agent;" and, 2d, "because the said count does not show any cause of action, or that the proper and necessary affidavit or complaint was made, upon which the justice could issue a peace-warrant." To the third count the same causes of demurrer were assigned as to the first and second counts.

The court sustained the demurrer, and its judgment thereon is now assigned as error,

CHILTON & YANCEY, for appellant.

GOLDTHWAITE, RICE & SEMPLE, *contra*.

R. W. WALKER, J.—[June 4, 1861.]—It was supposed at one time that an action for a tort would not lie against a corporation. But this idea has been long since exploded, and the tendency of the law in our day is to extend the application of all legal remedies to corporations, and to assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. Accordingly, the modern authorities have established the doctrine, that trover, trespass *quare clausum*, and trespass for an assault and battery, will lie against a corporation.—*Yarborough v. Bank*, 16 East, 6; *Bloodgood v. Mokawuk & Hudson River Railroad Co.*, 18 Wend, 9; *Mapnd v. Monmouthshire Canal Co.*, 4 Mann. & Gr. 452; *Eastern Counties Co. v. Broom*, 2 Eng. L. & Eq. 406; *Moore v. Fitchburgh Corp.*, 4 Gray, 465; see, also, *First Baptist Church v. Schenectady Co.*, 5 Barbour, 79; *McDougal v. Bellamy*, 18 Geo. 411; *Commonwealth v. Proprietors N. B. Bridge*, 2 Gray, 345; 12 Barb. 196; *Smoot v. Mayor*,

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24 Ala. 112. And upon this same reasoning, a corporation may be sued in trespass for false imprisonment.

In like manner, when the action of a corporation becomes injurious to the public at large, the public may have its remedy by indictment. But it seems to be the law, that, inasmuch as a malicious motive and criminal intent cannot be attributed to a corporation, in its corporate capacity, it is not indictable for those crimes, of which malice, or some specific criminal intent, is an essential ingredient. Thus, in *Regina v. Great Northern Co.*, (9 Ad. & Ell. N. S. 315,) Lord Denman used this language: "Some *dicta* occur in old cases—'a corporation cannot be guilty of treason or felony.' It might be added, 'of perjury, or offenses against the person.' The court of common pleas lately held, that a corporation might be sued in trespass, (*Maund v. Monmouthshire Canal Co.*, 4 M. & Gr. 452;) but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them, and are violations of the social duties that belong to men and subjects. A corporation, which, as such, has no such duties, cannot be guilty in these cases; but they may be guilty as a body corporate, of commanding acts to be done to the nuisance of the community at large." So, in *Commonwealth v. Proprietors of New Bedford Bridge*, (2 Gray, 345,) it was said: "Corporations cannot be indicted for offenses which derive their criminality from evil intention, or which consist in a violation of those social duties which belong to men and subjects."—See, also, 1 Leading Cr. Cases, p. 141.

The distinction seems to be between acts injurious in their effects, and for which the actor is liable, without regard to the motive which prompted them, and conduct the character of which depends upon the motive, and which, apart from such motive, cannot be made the ground of a legal responsibility. If this distinction is well taken, it would follow, that since a corporation, as such, is incapable of malice, it is not liable to be sued for a malicious prosecution.—See *Childs v. Bank*, 17 Mis-

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sonri, 213; *Stevens v. Midland Counties Co.*, 26 Eng. L. & Eq. 410; *McClellan v. Cumberland Bank*, 24 Maine, 586; *State v. Great Works M. Co.*, 20 Maine, 41. And such appears to us to be the better opinion, although we are aware that there are authorities which seem to sustain the idea, that an action for a malicious prosecution may be maintained against a corporation.—See *Goodenow v. East Haddam Bank*, 22 Conn. 530; *P. W. & B. R. R. Co. v. Quigley*, 21 How. (U. S.); *National Exchange Co. v. Drew*, 82 Eng. L. & Eq. 1.

[2-3.] It results from what we have said, that the demurrers to the 1st and 2d counts were properly sustained. But the 3d count is not a count in case for malicious prosecution, but a count in trespass for false imprisonment, (*Sheppard v. Furniss*, 19 Ala. 760; *Ragsdale v. Bowles*, 16 Ala. 62; Code, p. 554,) which, as we have seen, will lie against a corporation. No sufficient objection to this count is stated in the demurrer to it; nor was the misjoinder of counts assigned as one of the grounds of the demurrer to the entire complaint. The demurrer to the 3d count, and the demurrer to the entire complaint, should, therefore, have been overruled.

Judgment reversed, and cause remanded.

BONDURANT vs. SIBLEY'S HEIRS.

[BILL IN EQUITY BY JUDGMENT DEBTOR FOR REDEMPTION OF LANDS.]

1. *Who are parties defendant.*—A person against whom process is prayed, and who the bill prays may be required to answer, is thereby made a party defendant, notwithstanding the want of appropriate allegations showing his interest in the litigation.
2. *Amended bill; filing without leave, and waiver of irregularity.*—An amended bill, or matter of amendment brought forward in a bill of revivor, will be stricken out on motion, if filed without leave

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previously obtained; but, if no such motion is made, and answers are afterwards filed, treating the amendment as properly made, and it is recognized and acquiesced in, both by the parties and by the chancellor, the appellate court will consider the irregularity as waived.

3. *Appointment of guardian ad litem for infant defendant.*—The appointment of a guardian *ad litem* for an infant, who is not at the time a party to the suit, is a nullity; but, after the infant has been made a party, the appointment of a guardian *ad litem* for him, even if made without any previous service of process, and otherwise irregular, is voidable merely, and not absolutely void; yet such irregular appointment, although it will work a reversal on error of a decree against the infant, and may be vacated by the chancellor on motion, is valid until reversed or set aside; and the subsequent appointment of another guardian, while the former is unrevoked, is void.
4. *Service of process on infant.*—Personal service of process on an infant, who is under fourteen years of age, is irregular.
5. *Dismissal of bill for want of prosecution.*—Where the complainant refuses, after his bill has been pending for several years, to pursue the course suggested by the chancellor, and which is the only proper course, to bring in a party, who, though made a defendant, has not been brought before the court, the bill may be dismissed, on motion, for want of prosecution; and the complainant cannot excuse his negligence in failing to proceed against the absent defendant, on the ground that he was not a necessary party to the bill. Where the complainants are infants, suing by their next friend, the more usual, and, ordinarily, the proper practice, is to remove the next friend; yet, if the chancellor, in the exercise of his discretion, dismisses the bill, the appellate court will presume that he did so because the interests of the infants did not require a further prosecution of the suit.
6. *Who are necessary parties to bill for redemption.*—The heirs-at-law of the deceased purchaser of lands sold under execution, he having died intestate, are necessary parties to a bill for redemption filed by the judgment debtor.

APPEAL from the Chancery Court of Perry.
 Heard before the Hon. JAMES B. CLARK.

THE original bill in this case was filed, on the 20th March, 1848, by Joseph H. Bondurant, against the personal representative and heirs-at-law of Charles Sibley, deceased; and sought to redeem certain lands, which had been sold under execution against said Bondurant, and

which were purchased at the sale by said Sibley. Mary Perkins, the wife of A. N. Perkins, was alleged to be one of the children and heirs-at-law of said Sibley; and the bill prayed that she and her husband might be made defendants, that subpoenas might issue to them, and that they might be required to answer. On the 22d May, 1848, after the administrator had answered the bill, and after said A. N. Perkins had also filed an answer, in which he alleged that his wife, Mary Perkins, died on or about the 20th February, 1848, the register granted leave to the complainant to amend his bill, by inserting at the proper place the following words: "That on the — day of February, 1848, the said Mary Perkins died, leaving an infant, without a name, about four months old, surviving." On the 21st June, 1848, on motion of the complainant, the chancellor made an order, appointing the master "to act as the guardian *ad litem* for the infant defendant mentioned in the amended bill." At the June term, 1850, the complainant's death was suggested, and leave was granted to revive the suit in the names of his heirs-at-law; and a bill of revivor was accordingly filed, on the 14th February, 1851, in the names of his children as heirs-at-law, all of them being infants, and suing by their next friend. The bill of revivor recited the leave to amend the original bill, and alleged, "that the said bill was accordingly amended as therein shown; that by the said amendment of said bill it was shown that Mary Perkins died on the — day of February, 1848, leaving an infant, only four months old, surviving her, and that said infant is named Charles S. Perkins." The bill of revivor stated, also, that no guardian *ad litem* had been appointed for said infant, although he was made a party to the bill by the amendment; claimed the right to revive the suit against the defendants, naming Charles S. Perkins as one of them; and prayed that he might be required to answer both the original bill and the bill of revivor, and that subpoenas might issue to him and the other defendants. But, notwithstanding the leave to amend the original bill, and the recitals of the bill of revivor that the bill had been accordingly amended,

the amendment was not in fact made, either by interlineation, or on a separate sheet of paper.

A subpoena was issued on the bill of revivor, directed to Charles S. Perkins with the other defendants, and was returned by the sheriff, on the 20th March, 1851, "executed;" and answers were afterwards filed by the several adult defendants. At the June term, 1851, on motion of complainants' solicitor, the chancellor appointed A. N. Perkins as the guardian *ad litem* of Charles S. Perkins; the order reciting that the infant "is under the age of fourteen years, and that service as to him has been perfected by the service of subpoena on him;" and an answer was filed for the infant, by said A. N. Perkins, on the next day. At the November term, 1852, the cause was argued before the chancellor, on the demurrers incorporated in the answers of the several defendants; and, in his opinion overruling the demurrers, the chancellor noticed the fact that the original bill did not seem to have been amended, in accordance with the leave granted for that purpose, and suggested that it might be "well to consider whether the bill has been ever so amended as to bring in the infant defendant." At the November term, 1855, the cause was submitted to the chancellor, on pleadings and proof, for final decree; and it was insisted before him, by the counsel for defendants, that Charles S. Perkins had not been brought before the court. The chancellor overruled that point, and held that the infant was properly represented by his father, A. N. Perkins; but he dismissed the bill, on the ground that it did not contain a sufficient allegation of the delivery of possession without suit. At the January term, 1857, on appeal to this court, the chancellor's decree was reversed, and the cause remanded; this court declining to decide on the merits of the case.—See 29 Ala. 570.

On the 16th June, 1857, a subpoena was issued to Charles S. Perkins, which was returned by the sheriff, "executed by handing copy of the within to A. N. Perkins, his father, for the said Charles S. Perkins." At rules before the register, on the 16th November, 1857, on motion of

the complainants, J. H. Harrison was appointed guardian *ad litem* for said Charles S. Perkins: and, on the same day, said Harrison filed his consent in writing to act as such guardian, and filed an answer for the infant. At the December term, 1857, the complainants asked leave to amend the original bill, in accordance with the amendment allowed by the register, as above stated, in May, 1848; and also to amend that amendment, by striking out the words "without a name," and inserting in lieu thereof the words "named Charles S. Perkins;" and, at the same time, the adult defendants moved to dismiss the bill for want of prosecution. The chancellor overruled the defendants' motion, and granted the complainants' motion; and the original bill was accordingly amended by interlineation. At the same time, the chancellor made an order, *ex mero motu*, vacating and setting aside the last subpoena which had been issued to Charles S. Perkins, together with the appointment of Harrison as his guardian *ad litem*, and the answer filed by said Harrison as such guardian. At the December term, 1858, the cause was again submitted to the chancellor, on pleadings and proof, for final decree; and the defendants again insisted that Charles S. Perkins was not properly before the court, and moved to dismiss the bill for want of prosecution. The chancellor refused to dismiss the bill, but held that the infant had not been brought before the court in a proper manner, inasmuch as the service of the first subpoena on him, and the appointment of A. N. Perkins as his guardian *ad litem*, were both irregular and erroneous; and he therefore placed the cause back on the docket, in order that proper proceedings might be had to vacate that appointment, and to set aside all the subsequent orders based upon it. At the June term, 1859, on motion of the complainants' solicitor, the chancellor set aside the appointment of A. N. Perkins as the guardian *ad litem* of Charles S. Perkins, and all the proceedings which had been had thereon, at the costs of the complainants' next friend; but, on the next day, on motion of the same solicitor, this order was set aside, and the former orders vaca-

ted by it were reinstated; the last order of the court reciting, that said solicitor moved to set aside the order of the previous day "because the complainants' next friend was dissatisfied with him for having made the motion to vacate said appointment," &c. At the same time, the complainants' solicitor moved to set aside the order vacating the appointment of Harrison as the guardian *ad litem* of Charles S. Perkins, and the adult defendants again moved to dismiss the bill for want of prosecution. The chancellor refused to grant the order asked by the complainants, and dismissed the bill, on defendants' motion, for want of prosecution.

The decretal order made at the December term, 1857, setting aside the second subpoena to Charles S. Perkins, the appointment of Harrison as his guardian *ad litem*, and the answer filed by said Harrison; the decretal order setting aside the appointment of A. N. Perkins as guardian *ad litem*; the refusal to set aside the order vacating the appointment of Harrison, and the final decree dismissing the bill, are now assigned as error.

GOLDTHWAITE, RICE & SEMPLE, for the appellants.

1. Charles S. Perkins was properly brought before the court, and Harrison was regularly appointed his guardian *ad litem*; and the chancellor had no power, at a subsequent term, to vacate his appointment, and suppress the answer filed by him.—Ansley v. Robinson, 16 Ala. 793; State Bank v. Johnson, 9 Ala. 367; 6 Paige, 371; 2 A. K. Mar. 842, 168; 14 Peters, 156; 1 Dan. Ch. Pr. 218.

2. As the complainants were infants, they ought not to be held responsible for the negligence or misconduct of their next friend. Instead of dismissing the bill, the chancellor ought to have removed the next friend, and appointed another person in his stead; or, at least, to have referred it to the register to inquire what course the interests of the infants required.—Smallwood v. Rutter, 3 Eng. L. & Eq. 210; Nalder v. Hawkins, 2 Myl. & K. 248.

3. Sibley's heirs were not necessary parties to the suit,

their interests being fully represented by the administrator.—Castleberry v. Pierce, 5 Stew. & P. 150; 5 Dana, 285.

4. Even if the heirs were necessary parties, and there was a failure to perfect service on one of them, whose interest is defined and separable, the complainants were entitled to a decree against the other defendants, to the extent of their interest in the lands.

I. W. GARROTT, *contra*.—The complainants' bill was pending in the court for twelve years, and yet Charles S. Perkins was never brought before the court. This omission was repeatedly pointed out by the defendants, and was made the ground of several motions to dismiss; and the complainants' attention was directed to it by suggestions from the chancellor at different times. Yet, instead of taking the proper steps to remedy this defect, the complainants' next friend obstinately refused to act on the suggestion of the chancellor. The 28th rule of chancery practice, requiring that a bill shall be dismissed, if the complainant does not take proper steps to bring in the defendant before the second term after the filing of the bill, is peremptory; but, if it be only matter of discretion with the chancellor, his decision is not only amply justified by the facts, but cannot be revised by this court on appeal.

A. J. WALKER, C. J.—[July 11, 1861.]—[1-2.] The infant defendant mentioned in the amended bill, was not a party to the suit at the time the master was appointed to act as guardian *ad litem* for him. The bill of revivor, however, made Charles S. Perkins a party defendant. The want of appropriate allegations, showing his interest in the litigation, does not prevent him from becoming a party by virtue of the prayer that he should answer, and the prayer for process against him.—Walker v. Bank of Mobile, 6 Ala. 452; Lucas v. Bank of Darien, 2 Stew. 280. Thus far, the bill of revivor was a bill of amendment; and the amendment thus brought forward, having

been made without leave previously obtained, would have been stricken out on motion.—1 Dan. Ch. Pr. 468. But no such motion was made. Answers were filed by the defendants, treating the amendment as properly made; and there was afterwards a long acquiescence in, and recognition of the amendment, both by the parties, and by the court. Under these circumstances, we do not think that the amending feature of the bill of revivor, as it is denominated, ought to be regarded as not belonging to the record, notwithstanding it may not have been made in pursuance of a previous order.—Farmers' Loan & Trust Co. v. Reid, 3 Edw. Ch. 414.

[3-4.] As the infant defendant mentioned in the amended bill was not a party to the suit at the time the master was appointed to act as guardian *ad litem* for him, that appointment was a nullity; and it seems to have been so treated by the chancellor. But, as Charles S. Perkins was made a party by the bill of revivor, the chancellor then had jurisdiction to appoint a guardian *ad litem* for him; and the appointment, even if made without any previous service, and otherwise irregular, would not be void, but voidable merely.—Preston v. Dunn, 25 Ala. 507. The appointment of A. N. Perkins, at the June term, 1851, as the guardian *ad litem* of Charles S. Perkins, no matter how irregular it may have been, was not void; because the infant was a party to the suit when it was made. It was, however, irregular; and this court would, on account of the irregularity, have reversed a decree against the infant. The irregularity consisted alone in the fact, which is shown both by the return on the subpoena and by the order making the appointment, that the subpoena was served on the infant personally, who was at that time only three or four years of age.—20th Rule of Chancery Practice, 24 Ala. V; Clark v. Gilmer, 28 Ala. 265; Sanders v. Godley, 23 Ala. 473; Hodges v. Wise, 16 Ala. 509; Walker v. Bank of Mobile, 6 Ala. 452. The chancellor had, unquestionably, the power to vacate this irregular interlocutory order; and it would have been his plain duty to do so, on the motion of the complainants.—

8 Dan. Ch. Pr. 1616, 1807; Walker v. Bank of Mobile, 6 Ala. 452.

The register's appointment of Harrison, as the guardian *ad litem* of Charles S. Perkins, was clearly improper; because there was then an existing appointment, which was valid until set aside. Harrison's appointment was strictly analogous to the appointment of a second administrator without revoking the appointment of the first. As the second appointment of an administrator would be void, so also is the second appointment of a guardian *ad litem* in this case. If it were not so, there would be two separate and distinct guardianships at the same time. As Harrison's appointment was void, the order of the chancellor setting it aside was correct.

[5-6.] The order setting aside the appointment of A. N. Perkins, as the guardian *ad litem* of Charles S. Perkins, was vacated on motion of the complainants' solicitor; and the solicitor seems from the record to have made the motion, because his client was dissatisfied with him for obtaining the vacation of the appointment. The appellants cannot complain of the action of the chancellor in thus setting aside the order vacating the appointment of Perkins, although it may have been improper, because it was made at their instance. It would have been improper for the chancellor to grant the complainants' motion to set aside the order vacating the appointment of Harrison. The order setting aside the appointment of Perkins, which the complainants would not permit to remain when it had been made, and would not ask when it was suggested by the chancellor, was the only possible means by which the infant could be represented in court in a regular manner. The complainants refused, not only to do what was necessary to prepare the cause for a hearing, but to permit the necessary order to remain when it had been made. There was, therefore, a refusal on their part to prosecute the suit in a regular and legal manner; and we think the chancellor had authority to dismiss it for want of prosecution, as he did, on the defendants' motion. Instead of dismissing the bill, he undoubtedly might have

removed the next friend of the infant complainants; and that would have been the more usual, and, ordinarily, the proper course. It is, however, a matter as to which the chancellor must, we think, be allowed some latitude of discretion. We cannot presume that he acted in disregard of the interests of the infant complainants. On the contrary, we think it fair to presume that he adopted the course that he did, only upon a reasonable conviction that the interests of the infants did not require a further prosecution of the suit. It is argued, however, for the appellants, that Sibley's heirs were not necessary parties to the suit. But, if it were conceded that they were only proper, and not necessary parties; it would be the duty of the complainants nevertheless, having made them parties to the bill, either to amend the bill, and omit them from it, or to proceed with proper diligence to bring them before the court. The heirs, however, were clearly indispensable parties; for the object of the bill was to divest them of a legal title which had descended to them.—*Batre v. Auze*, 5 Ala. 173; *Erwin v. Ferguson*, 5 Ala. 158; *Kennedy v. Kennedy*, 2 Ala. 573; *Jennings v. Jenkins*, 9 Ala. 286; 1 Dan. Ch. Pl. 241, 256.

The decree of the chancellor is affirmed.

McCOLLUM vs. PREWITT.

[BILL IN EQUITY FOR INJUNCTION OF JUDGMENT AT LAW.]

1. *Equitable relief against judgment at law, on ground of discovery.*—After the rendition of a judgment at law against a party, he cannot maintain a bill in equity for a discovery as to matters of purely legal cognizance, without showing a sufficient excuse for his failure to take the proper steps to obtain the discovery, either by bill in equity, or by interrogatories under the statute, while the action at law was pending.
2. *Same, on ground of usury.*—Usury in the note on which a judgment

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at law is founded, constitutes no ground for equitable relief against the judgment, unless a sufficient excuse is shown for the failure to make the defense at law.

3. *Same, on account of surprise, accident, mistake, or fraud.*—A party who seeks equitable relief against a judgment at law, on grounds which were available as a defense at law; and who simply shows that he had a valid defense to the action, and a sufficient excuse for his failure to be present at the trial term, at which the judgment was rendered; but fails to show that he had employed counsel, or summoned witnesses, or taken any other steps to defend the action, although it was pending more than six months before the judgment was rendered,—does not relieve himself from the imputation of negligence, and, consequently, is not entitled to relief.
4. *Same, on account of irregular affirmance on certificate.*—The affirmance of a judgment by the supreme court, on certificate, at the term next preceding that to which the appeal is taken, may be corrected on motion, and, consequently, furnishes no ground for equitable relief against the judgment.

APPEAL from the Chancery Court of Fayette.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 30th September, 1859, by James K. McCollum, against John W. Prewitt; and sought to enjoin a judgment at law, which said Prewitt had recovered against said McCollum and others. The action at law, in which said judgment was rendered, was commenced on the 20th September, 1858, and was founded on a promissory note for \$1050, executed by said McCollum and others, dated the 8th July, 1856, and payable six months after date; and the judgment was rendered, on the verdict of a jury, on the 19th April, 1859. The consideration of said note, according to the allegations of the bill, was \$400 loaned by said Prewitt to said McCollum, and an open account, for about \$100, which McCollum's son had contracted with said Prewitt; the residue consisting of usurious interest on the money loaned. In addition to the charge of usury, the complainant alleged, that he had delivered to the defendant, before the rendition of said judgment, warehouse receipts for sixteen bales of cotton, "upon the special trust and confidence that he (said defendant) would take control of said cotton, dis-

pose of the same, and apply the proceeds to the discharge of said debt"; that the defendant sold the cotton, but failed to give the complainant credit on the note for the amount of the proceeds of sale, and refused to inform him of the amount realized by the sale; and that the complainant knew no person, except the defendant, by whom he could prove the trust on which the defendant received the cotton, and the price for which it was sold. In excuse of his failure to appear and defend the action at law, the complainant alleged, that his residence was twelve miles from the court-house; that his wife was dangerously ill during the entire term of the court at which the judgment was rendered, and required his constant attendance; that he sent an agent to the court, to make his excuse for non-attendance, and to ask a continuance of the cause; that said agent informed him, on his return, that the cause had been passed by the court, in order that he might have an opportunity to submit an affidavit, stating the cause of his absence and the grounds of his defense, and that the cause would be continued, or at least so much of it as he proposed to litigate, on the reception of his affidavit; that he accordingly made an affidavit before a justice of the peace, stating therein the grounds of his defense and the cause of his personal absence, and forwarded it to the court; and that he did not learn, until after the adjournment of the court, that his application for a continuance had been disregarded, and a judgment rendered against him for the full amount of the note and interest thereon. The complainant further alleged, that, on or about the 1st July, 1859, he sued out an appeal from said judgment, returnable to the next January term of this court, and gave bond, with sureties, to supersede said judgment; and that on or about the 14th July, 1859, the defendant procured an affirmance of said judgment in this court, on certificate, "by improperly representing, through his attorney, that said appeal was taken to the June term, 1859, of said court, and suppressing the fact that it was taken to the January term, 1860." The prayer of the bill was for an injunction of the judgment, a discovery as to

the proceeds of the cotton, an account, and general relief. The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

W. P. CHILTON, with THOS. M. PETERS, for appellant.
E. W. PECK, with E. A. POWELL, *contra*.

STONE, J.—[July 15, 1861.]—The first point relied on in support of the equity of the present bill is, that it can be sustained as a bill for discovery. It has long been settled in this State, that a party who is sued at law, and suffers judgment to go against him, can not afterwards maintain a bill for discovery of matters of purely legal defense to the action at law, unless he shows sufficient excuse for not defending at law, and brings himself within the rule which, in certain cases, allows a party, after trial at law, to have a retrial in equity.—See *Powell v. Stewart*, 17 Ala. 710; 1 Beav. Dig. 284, § 696. Under this principle, bills for discovery, after judgment at law, are placed in the same category with other bills for relief against judgments at law, on account of alleged *fraud, accident, or the act of the opposite party*.

[2.] The second ground relied on is, that there is unusual interest charged in the note, and recovered by the judgment. This ground stands on the same footing as the other, and comes too late, unless a sufficient excuse be rendered for not defending at law.—See *Mallory v. Matlock*, 10 Ala. 595; *Jones v. Kirksey*, *ib.* 579.

[3.] This case must, then, be disposed of without any reference to the points above noted, further than they tend to show that complainant had a good and valid defense to the action at law. It was early settled in this court, and has never been departed from, that equity will not interfere after a judgment at law, unless the party can impeach the justice of the judgment by facts, or on grounds, of which he could have availed himself, and was prevented from doing so by fraud, accident, or the act of the opposite party, *unmixed with fault or negligence on his part*.—*French v. Garner*, 7 Por. 549; *Davis v. McCampbell*, and

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Shannon v. Reese, adm'r of King, both at the present term. In the present case, Mr. McCollum had been sued some seven months before the judgment was rendered. He probably shows a sufficient excuse for not being present at the term of the court when judgment was given against him. But for his omission to make preparation during all the time intervening between the commencement of the suit and the trial, he offers no excuse. He filed no bill, and served no interrogatories for discovery, in aid of his defense at law; and if he employed counsel to defend him, or summoned witnesses to testify in his behalf, he has not informed us of it. This does not relieve him from the imputation of negligence.—Haughey v. Strang, 2 Por. 177; Pharr v. Reynolds, 8 Ala. 521; Stinnett v. Branch Bank, 9 Ala. 120; Foster v. Bank, 17 Ala. 672; Hair v. Lowe, 19 Ala. 224; Perrine v. Carlisle, *id.* 686; Watts v. Gayle, 20 Ala. 817; Talliaferro v. Branch Bank, 23 Ala. 755; Allman v. Owen, 31 Ala. 167; Moore v. Lesueur, 33 Ala. 248.

[4.] The irregularity in the affirmance of the judgment by this court, could have been corrected on motion, and furnished no ground for equitable interposition.—McClure v. Colclough, 6 Ala. 492.

Decree of the chancellor affirmed.

BOYKIN & McRAE vs. DOHLONDE & CO.

[ACTION FOR PRICE OF GOODS SOLD AND DELIVERED.]

1. *Statute of frauds as to promise to answer for debt, &c., of another; whether promise is original or collateral.*—In determining whether a parol promise to pay for goods delivered to a third person is within the statute of frauds or not, the decisive question is, to whom was the credit given: if the credit was given altogether to the defendant, his promise is direct and original, and not within the statute;

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accus, if any credit at all was given to the person to whom the goods were delivered.

2. *Same.*—It is the province of the jury, in such case, to determine to whom the credit was given; and it is their duty, in deciding that question, to take into consideration the extent of the undertaking, the expressions used, the situation of the parties, and all the other circumstances of the case. The fact that the goods were charged, on the plaintiff's books, to the person to whom they were delivered, if unexplained by other circumstances, would be very strong, if not conclusive evidence, that the defendant's promise was collateral; and, on the other hand, the fact that the plaintiff and defendant have both acted as if the credit was given solely to the defendant, if unexplained by other evidence, would be a circumstance strongly tending to show that his promise was direct and original; yet neither of these facts is conclusive, but they are susceptible of explanation, and their weight as evidence must depend upon the circumstances of the particular case.

APPEAL from the City Court of Mobile.

Tried before the Hon. ALEX. MCKINSTRY.

THIS action was brought by F. Dohlonde & Co., against the appellants, to recover the sum of \$1587 60, the price of certain goods, wares and merchandize sold and delivered. The complaint contained two counts; the first alleging the sale and delivery of the goods to the defendants themselves, on the 31st March, 1860; and the second alleging the sale and delivery to R. S. & T. D. Weir, at the special instance and request of the defendants, on and before the 31st March, 1860. The defendants pleaded the general issue, and the statute of frauds. It appeared on the trial, that the plaintiffs were grocers in Mobile, where the defendants also were engaged in business; and that R. S. & T. D. Weir, to whom the goods were furnished, were merchants at Enterprise, Mississippi. The transactions between the plaintiffs and the Weirs commenced in April, 1858, when the latter wrote a letter to the plaintiffs, requesting them to send goods to the writers at Enterprise, and referring them to the defendants for payment. The plaintiffs, through their clerk, exhibited this letter to the defendants, and inquired whether they would pay for goods forwarded to the Weirs; to which the de-

defendants replied, as plaintiffs' clerk testified, that they would pay for the goods if the accounts were presented monthly. The plaintiffs forwarded the goods to the Weirs, and forwarded other goods at divers times, up to the 1st March, 1860, amounting in the aggregate to over \$34,000; charging them on their books to the Weirs, and presenting monthly accounts to the defendants. With the exception of three payments, made by the Weirs, at different times, directly to the plaintiffs, and amounting in the aggregate to \$3411, the accounts were paid monthly by the defendants, up to the 1st March, 1860, when a balance of \$1587 60 was due to the plaintiffs. The Weirs became insolvent about the 1st March, 1860, and transferred all their assets to the defendants. The plaintiffs presented their account, on which the suit was founded, and which was then made out against the Weirs, to the defendants for payment, about the 1st April, 1860; and the defendants then refused to pay it, and denied their liability for it. The defendants read in evidence seven letters, written to them by the Weirs at different times, between the 29th April, 1858, and the 30th September, 1859; requesting them to pay the writers' accounts with the plaintiffs.

"The court charged the jury, (among other things,) that they must ascertain whether the goods were furnished on the credit of the Weirs, or of the defendants; that if they were furnished on the credit of the Weirs, and the defendants were guarantors or sureties, then the plaintiffs could not recover; that all promises for the debt, default, or miscarriage of another, are void by the statute of frauds, unless in writing; that, as this promise was not in writing, it was void, if it came within the statute; and that this is the law as to any assurances or representations concerning the dealings of any other persons. If, however, the goods were furnished on the credit of the defendants, and would not have been forwarded unless the defendants had agreed to pay all the bills that were rendered monthly, it does not come within the statute of frauds; and if the jury believe that the plaintiffs for-

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warded the goods to the Weirs, time and again, from April, 1858, to April, 1860, and the defendants regularly acknowledged their liability by the payments of the accounts when rendered, and did not notify the plaintiffs that they should not continue to do so, until after the insolvency of the Weirs, and their insolvency occurred after the March bill of goods had been forwarded,—such acts of the defendants were circumstances to look at, in ascertaining what they considered the contract to be.”

The defendants excepted to this charge, and requested several other charges, of which the court refused the following:

“4. To make a person liable for goods delivered to another, there must be an original undertaking by him, so that the credit was given solely to him, or there must be a contract in writing.

“5. If the goods were charged on the plaintiffs’ books to the Weirs, being made by the plaintiffs themselves at the time of the sale, this fact would be almost decisive against the plaintiffs’ claim against the defendants, as the original purchasers.

“6. If the jury believe, from the evidence, that the Weirs were liable at all to the plaintiffs for the goods furnished, then the defendants’ promise, to make them liable, must have been in writing; and not being in writing, they should find for the defendants.

“7. That both the Weirs and the defendants can not be made originally liable; and if the goods were sold to the Weirs, and not to the defendants, the latter are not liable.”

The defendants excepted to the refusal of these charges; and they now assign as error the charge given by the court, and the refusal of the several charges requested.

WM. BOYLES, for appellants.

R. W. WALKER, J.—[June 5, 1861.]—1. In the construction and application of that branch of the statute of frauds regulating promises made by one person to answer

for the debt, default, or miscarriage of another, numerous difficulties have arisen, and many perplexing distinctions have been taken. But one anchorage at least has been gained by the course of decision in England and in this country, that is, that when the promise of the defendant is to pay for articles to be furnished to a third person, if the transaction be such that the third person is responsible to the person who supplies the articles, the promise of the defendant is collateral, and, if oral, not binding. This is the principle decided in the leading case of *Buckmyr v. Darnall*, 2 Lord Raym. 1085; S. C., 1 Salk. 27. There, in consideration that the plaintiff would deliver his horse to one English, the defendant promised that English should return him safe. Holt, C. J., Gould and Powell, Justices, were at first of opinion, that the case was not within the statute, because they thought that English was not liable upon the contract. Mr. Justice Powys differed. The chief-justice and his associates in opinion agreed, that if any trust was given to English, then the case would be within the statute; but they thought that no credit had been given to him. The case stood over for further consideration; and the chief-justice having advised with the judges of the court of king's bench, it was finally determined, that, as English might have been charged on the bailment, in detinue, on the original delivery, the promise made by the defendant was within the reason and words of the statute. The same doctrine was laid down in *Matson v. Wharam*, (2 Term R. 80,) by Buller, J., who said, "The general line now taken is, that, if the person for whose use the goods are purchased is liable at all, any other promise by a third person to pay that debt must be in writing; otherwise, it is void by the statute of frauds, 29 Car. II, c. 3."

The rule thus declared is adopted by Sergeant Williams, as a correct construction of the statute, in his note to *Firth v. Stanton*, 1 Wm. Saunders, 211 (a), and has been sustained by a great weight of authority in this country as well as in Great Britain. When, therefore, an action is brought against one, charging him with the value

of goods delivered to another, and on his promise to pay; and it is set up in defense, that the promise was to pay the debt of another, and was not in writing, the decisive question is, to whom was the credit given. If the credit was given solely to the defendant—that is, the goods were really sold to him, though delivered to another—the statute is then out of the case. But, if the whole credit was not given to the defendant—that is to say, if any credit at all was given to the party receiving the goods—the promise of the defendant is collateral, and within the statute. For, in that case, the plaintiff would have a remedy against the party receiving the goods; and all the cases show that it does not matter upon which of the two parties the plaintiff principally depends for payment, so long as the person for whose use the goods are furnished is at all liable to him.—Authorities *supra*; Anderson v. Hayman, 1 H. Black. 120; Barber v. Fox, 1 Stark. R. 270; Chase v. Day, 17 Johns. 114; Rogers v. Kneeland, 13 Wend. 114, 121; Brady v. Sackrider, 1 Sandford S. C. R. 514; Cahill v. Bigelow, 18 Pick. 369; Matthews v. Milton, 4 Yerger, 576; Caperton v. Gray, 4 Yerger, 563; Hazen v. Bearden, 4 Sneed, 48, 50; Cutler v. Hinton, 6 Rand. 509; Ware v. Stephenson, 10 Leigh, 155; Noyes v. Humphreys, 11 Gratt. 686; Leland v. Creyon, 1 McCord, 100; Taylor v. Drake, 4 Strob. 431; Faires v. Lodane, 10 Ala. 50; Puckett v. Bates, 4 Ala. 390; Sanford v. Howard, 29 Ala. 691; Browne's Stat. Frauds, §§ 197–8; Addison Contr. 37–8; 3 Kent, (m. p.) 123.

The law of this case, therefore, is, that if the transaction was such that the Weirs are legally bound to the plaintiffs to pay for the goods, the promise of the defendants was not direct, but collateral, and, therefore, within the statute of frauds; and the converse of the proposition is also true. It follows, that the court erred in refusing to give the fourth and sixth charges asked by the defendants.

It is proper to remark, that there is nothing in the evidence which warrants the idea, that this was a joint purchase of the goods by the defendants and the Weirs, for

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the use of the latter. The undertakings of the parties were altogether distinct, and the liabilities growing out of them must also be distinct. If the Weirs are liable at all, it is as principals; and if the defendants are liable, it is not as co-promissors with the Weirs, but by virtue of a distinct contract of their own, to which the Weirs were not parties. Hence the question, whether a direct purchase by two persons, for the use of one, is governed by the rule above laid down, or constitutes an exception to it, does not arise upon the record, and we express no opinion in regard to it.—See *Wainright v. Straw*, 15 Ver. 215; *Williams, ex parte*, 4 Yerger, 579; 1 *Smith's Lead. Cas.* (5th Am. ed.) 380, 382; *Browne's Stat. Frauds*, §§ 197-8; 2 *Parsons Contr.* 301; *Norris v. Spencer*, 18 Me. 324.

2. Whether a contract is collateral or original, may be a question of construction, as in *Scott v. Myatt*, 24 Ala. 439; and then it is for the court. But in cases like the present, the question, to whom credit was given, is one of fact to be determined by the jury.—1 *Parsons Contr.* 500; *Storr v. Scott*, 6 C. & P. 241; *Browne's Stat. Frauds*, § 199; 1 *Smith's Lead. Ca.* (m. p.) 134, note; *Scott v. Myatt, supra*. The entry in the books of the seller is often of great importance, in determining to whom credit was given. Being made by the seller, it is, of course, of much greater weight when against him, than when it sustains his claim. If, on production of the plaintiff's books, it appears that the defendant was not originally debited there, but that the goods were charged against the person receiving them, this fact, if unexplained by other circumstances, would be very strong, if not conclusive evidence, that credit was given to the person receiving the goods.—*Storr v. Scott*, 6 C. & P. 241; *Hazen v. Bearden*, 4 Sneed, 48; *Leland v. Creyon*, 1 *McCord*, 100; *Matthews v. Milton*, 4 Yerger, 576; *Flanders v. Crolius*, 1 Duer, 206; 1 *Parsons Contr.* 499; *Browne's Stat. Fr.* § 198; 1 *Smith's Lead. Ca.* (m. p.) 134, note. But, as the question, to whom credit was given, must depend upon the intention of the parties, the fact that the goods are

charged to the person receiving them, is not conclusive, but may be explained, and made consistent with the assumption of the defendant's primary liability. Other circumstances in the case may show (as was done in *Sanford v. Howard*, 29 Ala. 684, and *Hazen v. Bearden*, *supra*.) that the account was so kept for convenience, and to avoid confusion and misunderstanding; and that in point of fact the credit was given to the defendant, and he alone considered liable for the goods.—See, also, *Cutler v. Hinton*, 6 Rand. 509; *Loomis v. Smith*, 17 Conn. 115. On the other hand, if the defendant has been treated by the person selling the goods, and has himself acted as if he were the sole party liable, that, if not explained by other evidence, would be a circumstance conducing to show that his promise was not collateral. But it is impossible to specify any one fact, or set of facts, on which the question, to whom the plaintiff gave credit, is to be determined; and the weight to which any particular fact may be entitled, must vary with the varying circumstances with which it may be found connected. Consequently, when there is any conflict of evidence upon the subject, the weight to be given to any particular circumstance should be left to the jury, who, in deciding the question, to whom the credit was given, should take into consideration "the extent of the undertaking, the expressions used, the situation of the parties, and all the circumstances of the case."—*Elder v. Warfield*, 7 H. & J. 391; *Hazen v. Bearden*, 4 Sneed, 48; *Browne's Stat. Frauds*, § 199.

As the judgment must be reversed for the errors before pointed out, and as what we have already said will probably furnish a sufficient guide for the conduct of the case on another trial, we do not deem it necessary to examine particularly the other charges asked and refused, or the charges given and excepted to.

Judgment reversed, and cause remanded.

HERRIN vs. BUCKELEW.

[CERTIORARI CASE FROM JUSTICE'S COURT.]

1. *Civil jurisdiction of justice of the peace.*—Where several promissory notes, each for a less sum than fifty dollars, are executed at one and the same time, for a single debt amounting to the aggregate of their several sums, and are made payable on the same day, such notes are within the civil jurisdiction of a justice of the peace.

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. ROBERT DOUGHERTY.

THE agreed facts of this case are these: On the 26th January, 1858, Stephen W. Herrin borrowed \$1260 from F. W. Buckelew, and, to secure the repayment thereof, executed to said Buckelew twenty-eight promissory notes, for \$45 each, all dated on said 26th January, 1858, and payable on the 25th December next after date; which notes were also signed by J. M. Baker and James Saxon, as sureties for said Herrin, and co-makers with him. These notes being unpaid at maturity, Buckelew instituted separate suits on them against the makers, before a justice of the peace; all the suits being commenced on the same day. The defendants pleaded in abatement to the jurisdiction of the justice; but a demurrer was sustained to their plea, and judgment rendered against them in each of the cases. The cases were removed by *certiorari* into the circuit court, and were there consolidated. The defendants again pleaded in abatement, and a demurrer was again sustained to their plea; and this ruling of the court, to which they reserved an exception, is the only matter assigned as error.

HEPLIN & FORNEY, for appellants.—1. The several notes were executed at one and the same time, for the same debt, and as parts of one and the same contract;

and they are therefore to be construed as one instrument. *Glassell v. Chapman*, 13 Ala. 50; *Strong's Executors v. Brewer*, 17 Ala. 706; *Elliott v. McClelland*, 17 Ala. 206; *Domas v. Hunter*, 17 Ala. 305; *Prater v. Darby*, 24 Ala. 496; *Doe d. Holman v. Crane*, 16 Ala. 570; *Trippe v. Trippe*, 29 Ala. 637. The notes are not the debt, but only the evidence of the debt.

2. A single and entire cause of action cannot be split up into several suits.—*Oliver v. Holt*, 11 Ala. 574; *De Sylva v. Henry*, 3 Porter, 321; *O'Neal v. Brown*, 21 Ala. 482; *Wittick v. Traun*, 27 Ala. 562; *Robbins v. Harrison*, 31 Ala. 162; 15 Wendell, 557.

3. At common law, a justice of the peace had no civil jurisdiction.—*Betner v. Marshall*, 17 Ala. 836; *Ellis v. White*, 25 Ala. 540; 7 Wendell, 435. Under the constitution of this State, (art. V, § 10,) his civil jurisdiction is limited to cases in which the amount in controversy does not exceed fifty dollars. To allow the parties, by such a device as appears in this case, to evade this constitutional provision, would enable them to do indirectly what they could not do directly, and to perpetrate a fraud on the jurisdiction of the justice. Moreover, consent of the parties cannot give jurisdiction of a subject-matter prohibited by law.—*Wyatt v. Judge*, 7 Porter, 37; *Winn v. Freele*, 19 Ala. 171; *Merrill v. Jones*, 8 Porter, 554; *Oakley v. Aspinwall*, 3 Comstock, 552.

C. D. HUDSON, *contra*, cited *Nibbs v. Moody*, 5 Stew. & P. 198; *Winston v. Majors*, 6 Ala. 659.

A. J. WALKER, C. J.—[June 7, 1861.]—The only question of this case is, whether a justice has jurisdiction over suits upon the several notes, each under fifty dollars, into which a debt exceeding fifty dollars is divided. We decide the question in the affirmative. The jurisdiction of a justice of the peace extends to causes in which the amount in controversy does not exceed fifty dollars.—Constitution of the State of Alabama, art. V, § 10. Where suits are brought upon notes for less than fifty dollars,

the amount in controversy is under fifty dollars, notwithstanding each note may be for a part of a debt exceeding that amount. The splitting up of a debt into sums under fifty dollars, involves no fraud upon the jurisdiction of the court. The creditor may lawfully, by his own separate act, bring by a receipt a debt over fifty dollars within the jurisdiction of a justice of the peace; and a *fortiori* may the same thing be done by the concurrent act of the creditor and debtor, in dividing a debt into several debts, each for an amount under fifty dollars. These propositions are well sustained by the authorities, and we need not elaborate them.—*Fortescue v. Spencer*, 2 Ired. Law, 63; *Dew v. Eastham*, 5 Yerg. 297; *Nibbs v. Moody*, 5 St. & P. 198; *King v. Dougherty*, 2 St. 487; *Baird v. Nichols*, 2 Port. 186. This court said, in *Nibbs v. Moody*, *supra*, that there was nothing, either in the constitution, or in the act defining the jurisdiction of a justice, to prevent the parties from reducing a debt, originally for more, to a less sum, and making it the amount in controversy; and that that might be done by the joint act of the parties, dividing the sum into new notes, by payment of part, and entering a credit on the note, or by the creditor's voluntary relinquishment of part. This statement of the law is entitled to our fullest approbation, both on account of its obvious correctness, and the long and uninterrupted acquiescence in it for more than twenty years. Affirmed.

STRICKLAND'S ADM'R vs. WALKER.

[ASSUMPSIT ON PROMISSORY NOTE, BY PAYEE AGAINST MAKER.]

1. *Statute of limitations; subsequent promise or acknowledgment.*—To revive a debt barred by the statute of limitations, the subsequent promise, or acknowledgment, must be clear and explicit; but it is not

necessary that the *evidence*, by which that promise or acknowledgment is established, should be clear and explicit.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by William Towns, as the administrator of the estate of Silas Strickland, deceased, against John Walker and Joshua Strickland; was founded on the defendants' promissory note for \$1,000, dated the 26th December, 1843, and payable one day after date, to said Towns, administrator, &c.; and was commenced on the 10th day of March, 1852. The defendant Strickland not being served with process, a discontinuance was entered as to him; and the action was revived, before the trial, in the name of Allen Eiland, as the administrator *de bonis non* of Silas Strickland. The defendant Walker pleaded, among other things, the statute of limitations of six years; and issue was joined on that plea. The note, which was read in evidence on the trial by the plaintiff, had a credit of \$204 34 endorsed on it, dated the 1st January, 1851, and signed by said Towns; as administrator. The plaintiff's evidence tended to show, that this credit was entered, with the consent of the defendant Walker, on a settlement of accounts between him and said Towns, and was written by one Wheaton; while the defendant's evidence conduced to show, that he never assented to the entry of the credit. The court charged the jury—

"1. That the assent of the defendant Walker, to the entry of the credit on the note, must not rest upon mere probabilities; but, before the plaintiff can recover, he must satisfy the jury, by evidence clear and explicit, that Walker did consent to the entry of said credit; and if the plaintiff has failed to satisfy their minds on this point, they will find for the defendant.

"2. That the administrator of Silas Strickland can only recover upon a demand which was assets of the estate of said Silas when this suit was brought; and if there is no

proof that the note sued on belonged to said estate at the time it was brought, the plaintiff can not recover."

These charges, to which the plaintiff excepted, are now assigned as error.

S. F. RICE, with CLOPTON & LIGON, for appellant.
GEO. W. GUNN, *contra*.

STONE, J.—[Feb. 11, 1861.]—The first charge given and excepted to in this case, asserts that, to revive a debt barred by the statute of limitations, the promise or acknowledgment must be proved by *evidence* that is *clear* and *explicit*. We have duly weighed this language, in connection with the authorities, and feel constrained to pronounce it erroneous. The promise, or acknowledgment, must be clear and explicit. No doubtful, ambiguous, or indeterminate language will avail. It must be, in its terms, unequivocal and determinate. If it be a promise, it must be an unequivocal promise; if an acknowledgment, that acknowledgment must be of the length of admitting the present existence of a debt, which the party is willing to pay. These principles are fully settled, in this State, by numerous adjudications.—*Ross v. Ross*, 20 Ala. 105; *Townes v. Ferguson*, 21 Ala. 47; *Bryan v. Ware*, *ib.* 687; *Moore v. Lesneur*, 18 Ala. 96; *Boxley v. Gayle*, 19 Ala. 151; *Pool v. Relfe*, 23 Ala. 701; *Pitts v. Wooten*, 24 Ala. 474; *Jordan v. Hubbard*, 26 Ala. 433; *Rolston v. Langdon*, 26 Ala. 660; *Evans v. Carey*, 29 Ala. 99; *Bell v. Morrison*, 1 Pet. S. C. 360.

But there is a wide difference between *the promise*, or *acknowledgment*, and the *evidence* by which that promise or acknowledgment is made to appear. The former, no matter how clearly it be proved—even though it be in writing—is not sufficient, if its terms be equivocal or indeterminate. But there is no rule which requires that the proof of such promise shall be different in measure, or more strict than that which is required to establish any disputed fact in a civil suit. Evidence which satisfies the minds of the jury, is enough.

We suppose the circuit court was misled by an inaccurate expression found in the opinion in the case of *Bell v. Morrison*, *supra*, and copied by Mr. Greenleaf in his work on Evidence, 2d vol. § 440. The language of the court in that case was, that "whenever the bar of the statute is sought to be removed by proof of a new promise, the promise, as a new cause of action, ought to be proved in a clear and explicit manner." The point in the case of *Bell v. Morrison* was on the sufficiency of the promise, and not on the evidence by which that promise was proved. The meaning of the court must have been, that the promise should be clear and explicit. Thus construed, it harmonizes with the weight of the American and the later English decisions, and with the analogies of the law.—See authorities *supra*; and *Bangs v. Hall*, 2 Pick. 368; *Gardiner v. Tudor*, 8 Pick. 206; *Cambridge v. Hobart*, 10 Pick. 232; *Mount Stephen v. Brook*, 3 B. & Ald. 141; *Tanner v. Smart*, 6 B. & Cress. 603.

It is not our purpose to criticise the 2d charge given. See *King v. Griffin*, 6 Ala. 337; *Harbin v. Levi*, *ib.* 399; *Spence v. Rutledge*, 11 Ala. 590; *Barron v. Vandvert*, 13 Ala. 232.

The judgment of the circuit court is reversed, and the cause remanded.

WATSON vs. COLLINS' ADM'R.

[ACTION ON NOTE GIVEN FOR PURCHASE-MONEY OF LAND AT ADMINISTRATOR'S SALE.]

1. *How administrator may or must declare.*—The words "administrator," &c., following the plaintiff's name in the margin of the complaint, are, of themselves, mere *descriptio personæ*; but an averment in the complaint, that the money sued for will, when collected, be assets of the decedent's estate, is sufficient to show that the plaintiff sues in his representative character.

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2. *Plea of no unques administrator.*—In an action brought by an administrator in his representative character, a plea, alleging facts which show that his letters of administration are void, for want of jurisdiction in the court by which they were issued, is a good plea in bar.
3. *Validity of grant of administration.*—A grant of letters of administration is not void, on account of the non-existence of assets in this State, if the intestate was an inhabitant of the county at the time of his death, (Code, § 1667;) nor are letters of administration *de bonis non*, granted by the probate court of the county in which the intestate had his domicile at the time of his death, void for want of unadministered assets, (Code, § 1720,) although they might be irregular and revocable.
4. *Validity of order of sale by probate court, for division.*—An order of the probate court, for the sale of a decedent's lands for the purpose of division among the heirs, obtained by an administrator *de bonis non* legally appointed, is not rendered void by the prior descent of the land to the heirs, the payment of all the debts, and the distribution of the personalty by the administrator in chief; although those facts might constitute good grounds of objection, in the probate court, to the granting of the order.
5. *Failure or want of consideration of note.*—In an action on a note given for the purchase-money of land, sold by an administrator under an order of the probate court, a defect in the title is no defense to the suit, if the court had jurisdiction to order the sale.

APPEAL from the Circuit Court of Choctaw.

Tried before the Hon. C. W. RAPIER.

The complaint in this case was in the following words:

"A. R. Davis, adm'r of the estate of Wm. Collins, dec'd,

vs.

C. L. Watson, J. W. Crowell, G. B. Walker.

"The plaintiff claims of the defendants the sum of one hundred and sixty-one 60-100 dollars, due by their promissory note, made by them on the 9th August, 1856, and payable on the 1st January, 1857, with interest thereon; the said sum, when collected, being assets of the estate of William Collins, deceased."

To which the following plea was filed: "The defendant C. L. Watson, for answer to the complaint, says, that the note mentioned in the complaint was made and exe-

cut by him for the payment and purchase of certain land in said county," (describing it,) "which the said plaintiff, as the administrator *de bonis non* of the estate of William Collins, formerly of Greene county, deceased, offered and undertook to sell as an unadministered portion of said estate; and which, upon such offer and undertaking, and upon the plaintiff's representation that he was administrator as aforesaid, this defendant bid off, at a pretended sale thereof at auction, made by the plaintiff, and executed his said note for, in the belief, and upon the faith that the plaintiff was such administrator, and as such authorized to sell said land; whereas, in truth, as defendant avers, there was not, at the time of the plaintiff's said pretended appointment as administrator of the estate of said William Collins, to-wit, in February, 1856, any estate whatever of the said Collins, or assets thereof, in the State of Alabama, of which an administrator could be appointed, or any allegation or proof made to the court that there was any such estate or assets, or that said estate was indebted, or any notice of such intended appointment given to the heirs; but that said estate, before that time, to-wit, between the years 1842 and 1848, had been fully administered and distributed according to law, all the debts thereof paid, and a final settlement made of such administration, to-wit, under the authority and direction of the orphans' court of said county of Greene, to-wit, in the year 1847; and that the lands which had belonged to the said Collins in his life-time, and among them the said lands bid off by this defendant as aforesaid, had passed to, and become the absolute property of, the heirs-at-law of the said Collins, long before the pretended or supposed grant of letters of administration to the said plaintiff as aforesaid; of all which said plaintiff had notice, and defendants knew nothing. And defendant further avers, that he has never had, and now has not, the possession of said land, or any part thereof, and did not and can not acquire any title thereto, as he is advised, by the said pretended sale; but that said land, though unenclosed, and not actually occupied by others, belongs to, and is claimed

by, some of the heirs of said Collins, and persons who have purchased the interest of the others; and that so there is a want and total failure of consideration for the said note made by him as aforesaid."

The court sustained a demurrer to this plea, and its judgment on the demurrer is now assigned as error.

MANNING & WALKER, for appellant, cited *Fisk v. Norvell*, 9 Texas, 13; *Miller v. Jones*, 26 Ala. 247; *Matthews v. Douthitt*, 27 Ala. 273.

GEO. F. SMITH, *contra*.

R. W. WALKER, J.—[June 28, 1861.]—[1-2.] In the margin of the complaint, the plaintiff is styled "administrator of the estate of William Collins, deceased." This, by itself, would be mere *descriptio personæ*; but the complaint alleges, that the sum sued for will, when collected, be assets of the estate of William Collins, deceased, which is sufficient to show that the suit is brought by the plaintiff in his representative character.—See *Harris v. Plant*, 31 Ala. 639; *Arrington v. Hair*, 19 Ala. 243; *Tate v. Shackleford*, 24 Ala. 210. Hence, a plea, alleging facts which show that the plaintiff's letters of administration are void, for want of jurisdiction in the court by which they were issued, would be a good plea in bar.—*Miller v. Jones*, 26 Ala. 247.

[3.] But we do not think that the plea filed by the defendant does this. Under our laws, it is only when the intestate resided out of the State at the time of his death, that the existence of assets in the State is necessary to give the court jurisdiction. Consequently, the non-existence of assets in the State would not make an administration void, if the intestate was an inhabitant of the county at the time of his death.—Code, § 1667. Nor do we think that an administration *de bonis non*, granted by the probate court of the county in which the intestate had his domicile at the time of his death, would be void for want of unadministered assets, although it might be irregular and revocable.—Code, § 1720.

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[4-5.] Neither does the plea show that the court had no jurisdiction to order the sale. The prior descent of the land to the heirs, the payment of the debts, and the distribution of the personalty by the administrator in chief, would not render *void* an order of sale for division, obtained by a legally appointed administrator *de bonis non*, although they might constitute a good ground of objection, in the probate court, to the granting of the order. And if the court had jurisdiction to order the sale, a defect in the title is no defense to a suit for the purchase-money.—*Lamkin v. Reese*, 7 Ala. 179; *Worthington v. McRoberts*, *ib.* 814; S. C., 9 Ala. 297; *Jennings v. Jenkins*, 9 Ala. 288; *Pool v. Hodnett*, 18 Ala. 752; *Burns v. Hamilton*, 33 Ala. 210.

Judgment affirmed.

PARISH vs. PARISH.

[BILL IN EQUITY FOR RECOVERY OF SLAVES, WITH ACCOUNT OF HIRE, &C.]

1. *Bequest to daughter "during her life-time, and her heirs after her."*—A bequest of slaves and land to the testator's daughter, 'to be her right and property during her life-time, and her heirs' after her, together with their increase; but, should she die without an heir, then the property to be divided among the rest of my [his] heirs'; followed by a general residuary bequest to her, of all the rest of his estate, both real and personal, "to be disposed of as she thinks fit among my [his] lawful heirs at my [his] death,"—under the operation of the rule in *Shelley's case*, vests in the daughter an absolute estate in the slaves.

APPEAL from the Chancery Court of Dale and Henry.
Heard before the Hon. WADE KEYES.

THE bill in this case was filed, on the 10th August, 1857, by Eleazar Galloway, against William Parish and Roger Parish; and sought a recovery of certain slaves,

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with an account of their hire, and the cancellation of a written instrument, by which the complainant had released all his interest in said slaves to William Parish. The complainant claimed the slaves under a conveyance from Amy Parish, dated the 21st June, 1844, and had them in his possession, as he alleged, from the time said conveyance was executed, until February, 1854, when William Parish, by fraud and misrepresentation, succeeded in obtaining the possession of them, and induced the complainant to release all interest in them to him. The bill alleged, that Roger Parish had possession of the slaves, held them adversely to William Parish, and claimed title to them as the property of the estate of Edward Parish, deceased, of which he was the administrator; and that William Parish had instituted a suit against him to recover them. The bill also prayed an injunction of this suit, and general relief.

Amy Parish, William and Roger Parish, and the complainant's wife, were the children of Edward Parish, deceased, who died in South Carolina, where he then resided, in 1822. The last will and testament of said Edward Parish, which was dated the 5th June, 1822, and admitted to probate on the 9th August, 1822, and of which said Amy Parish was appointed the executrix, contained the following clauses: "*First*, I give and bequeath to my beloved daughter, Amy Parish, two negroes, viz., Sid and Peter; also, one plantation, or tract of land, lying and being as follows," (describing it,) "to be her right and property during her life-time, and her heirs' after her, together with their increase; but, should she die without an heir, then the said property to be equally divided among the rest of my heirs. *Secondly*, I give to said Amy Parish all the rest of my estate, real and personal, to be disposed of by her as she thinks fit among my lawful heirs at my death." Amy Parish duly qualified, in South Carolina, as the executrix of said testator's will, and afterwards brought the slaves to this State, where she died, in the latter part of the year 1853, without children, and having never married. The slaves in controversy are the de-

scendants of the woman Sid, mentioned in the first clause of said will.

The defendants filed separate answers. William Parish admitted, that Amy Parish owned the absolute property in the slaves, and had conveyed them to the complainant; and he alleged, that he had purchased the complainant's interest in them, for a fair and valuable consideration, without any fraud or misrepresentation. Roger Parish admitted, that the conveyance from the complainant to William Parish was procured by fraud and other improper means, and ought to be set aside; but he denied that Amy Parish owned the absolute property in the slaves, and insisted, on the contrary, that she took only a life-estate under the will of Edward Parish. Each of the defendants demurred to the bill, for want of equity, for misjoinder of parties, and because the complainant had an adequate remedy at law; and William Parish prayed that his answer might be taken as a cross-bill for the recovery of the slaves from Roger Parish, with an account of their hire, and for general relief.

At the November term, 1858, by agreement of counsel, the cause was submitted to Chancellor KEYES, for a decree on the legal effect of the will of Edward Parish; and he held that, under the first clause of said will, Amy Parish took an absolute estate in the slaves. At the May term, 1860, on final hearing on pleadings and proof, Chancellor SAFFOLD presiding, the complainant's bill was dismissed, at his cost; and a decree was rendered, directing Roger Parish to deliver up the slaves to William Parish, and to account with him for the hire.

The appeal is prosecuted by Roger Parish; and, by agreement of counsel, the only matter assigned as error is that part of the chancellor's decree which relates to the construction of Edward Parish's will.

GOLDTHWAITE, RICE & SEMPLE, with whom was L. L. CATO, cited *Perrin v. Blake*, 4 Cruise, 381, tit. 38; *Tanner v. Livingston*, 12 Wendell, 83; *Tongue's Lessee v. Nutwell*, 13 Md. 415; *Findlay v. Riddle*, 3 Binney, 148;

Cooper v. Collis, 4 Term, 299; Bridges v. Wilkins, 3 Jones' Eq. (N. C.) 342; Riggins v. McClellan, 28 Missouri, 23; Austin v. Payne, 8 Rich. Eq. (S. C.) 9.

PUGH & BULLOCK, *contra*, cited Machen v. Machen, 15 Ala. 373; Hamner v. Smith, 22 Ala. 433; Isbell v. Maclin, 24 Ala. 315; Price v. Price, 5 Ala. 578; Ewing v. Standifer, 18 Ala. 400.

A. J. WALKER, C. J.—[June 17, 1861.]—There can be no doubt that the chancellor was correct in deciding, that Amy Parish took the absolute estate, and that the word *heirs* was a word of limitation, and not of purchase. There is nothing in the context which shows that the word *heirs* was used in the sense of children. The limitation over, upon the death of the first taker without heirs, with the direction that the property should be then divided, does not qualify "*heirs*," so as to give the word the signification of children. There is no qualification which prevents the heirs generally, lineal or collateral, from taking. The evident meaning of the testator was, that all persons who might be the heirs of Amy at her death, might take as heirs; and they can not take as purchasers. "When they take in the character of heirs, they must take in the quality of heirs." The rule in Shelley's case applies, and merges the limitation over to the heirs in the life-estate, and enlarges or expands the life-estate into a fee.—Price v. Price, 5 Ala. 578; Hamner v. Smith, 22 Ala. 433; Ewing v. Standifer, 18 Ala. 400; Machen v. Machen, 15 Ala. 373; Isbell v. Maclin, 24 Ala. 315; Shackelford v. Bullock, 34 Ala. 418; Lloyd v. Rambo, 35 Ala. 709.

In pursuance of the agreement of counsel, the approval of the chancellor's decision, upon the single point which we have noticed, must work an affirmance.

DEVAUGHN vs. HEATH.

[TRESPASS QUARE CLAUSUM FREGIT.]

1. *Vindictive damages.*—In trespass *quare clausum fregit*, a charge to the jury, asserting that they can not give vindictive damages, “unless they believe, from the evidence, that the defendants maliciously entered upon the plaintiff’s lands, in a rude, aggravating, or insulting manner,” is erroneous, because it improperly restricts the standard of liability.
2. *Gift to slave.*—There is no statute or rule of law in this State, which prohibits a gift of old clothes, or other articles harmless in their nature, to a slave, without the knowledge or consent of his master; but the title and possession, on the delivery of the articles to the slave, must be referred to the master.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by James Heath, against Samuel Devaughn, George W. Devaughn, Joshua Bussey, and Washington Bussey, to recover damages for a trespass on the plaintiff’s lands. It appeared from the evidence adduced on the trial, that one of the Devaughns suspected the plaintiff of trading with one of his slaves, and laid a snare to catch him, by sending the slave to the plaintiff’s house by night, with a piece of meat to sell, while the defendants lay hidden within hearing of the conversation which might ensue. The slave, however, sent information of the plot to the plaintiff; and when the party approached the plaintiff’s house, one Hammond, a young man living in the plaintiff’s house, secreted himself in the cotton, near the path by which they came, and recognized the defendants as the persons composing the party; and when the slave knocked at the door, and said that he had a piece of meat to sell, the plaintiff came out, and ordered him off. The plaintiff’s dogs were aroused by the party in ambush, and began to bark at them; and when the plaintiff called out “Who’s there”? the defend-

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ants ran off; but one of them was overtaken by the plaintiff and Hammond. Hammond, who was introduced as a witness by the plaintiff, testified to the information which the plaintiff received of the defendants' plot, and to the facts which occurred on the plaintiff's premises on the occasion referred to. The defendants proved, that the plaintiff had made inconsistent declarations at different times, when speaking of the occurrences at his house on the night of the alleged trespass; and that he or his wife had given two or three pairs of old pantaloons to Devaughn's slave, who had formerly belonged to Mrs. Heath's first husband.

The court charged the jury, at the request of the plaintiff, "that if Devaughn's slave had been an old family negro of the plaintiff's wife, then the plaintiff, or his wife, had a legal right to give said slave several pairs of old pantaloons, without the knowledge or consent of his master." The defendants excepted to this charge, and requested the court to instruct the jury, "that they can not give vindictive damages, unless they believe, from the evidence, that the defendants maliciously entered the plaintiff's lands, in a rude, aggravating, or insulting manner, and committed the trespass alleged in the complaint." The court refused to give this charge, and the defendants excepted; and they now assign as error the charge given, and the refusal of the charge asked.

ALLISON & ANDREWS, RICHARDS & FALKNER, for appellants.

BROCK & BARNES, CHILTON & YANCEY, *contra*.

STONE, J.—[June 28, 1861.]—The charge asked by the defendants in the court below, and refused by the court, assumes that, to justify the jury in awarding vindictive damages, in an action of trespass *quare clausum fregit*, the defendant must have entered the land *maliciously, in a rude, aggravating, or insulting manner*. These con-joint words evidently erected too strict a standard of liability. Trespasses might be so wantonly or recklessly committed, as to justify the imposition of vindictive dam-

ages, without any evidence of actual malice towards the owner of the property trespassed upon. The word *aggravating* was probably employed as the synonym of *offensive*, or *insulting*. According to it this meaning, cases may be imagined, which would call for exemplary damages, when the act complained of was neither tumultuous, grossly abusive, contemptuous, nor strictly insulting. It has been ruled that, "in cases attended with circumstances of aggravation, the jury may give exemplary damages." *Mitchell v. Billingsley*, 17 Ala. 394; *Parkerv. Mise*, 27 Ala. 483. When the circumstances of the trespass are rude, or insulting, malice may be inferred from them. So, malice or ill-will may be found to exist, when there are no accompanying acts of rudeness or insult. The charge was properly refused.—2 Greenl. Ev. § 253, and note.

[2.] The charge given asserts, that Mrs. Heath had the legal right to give to Ralph, the slave of Mr. Devaughn, three or four pairs of old pantaloons, without the knowledge or consent of the latter. We have looked into this question with much care, and cannot find that the circuit court erred in giving this charge. The articles are harmless in their character, and, *if given*, could not possibly have injured Mr. Devaughn. We have no statute which forbids the giving of articles like these to slaves. The substance of the charge was, that Mrs. Heath had the right to abandon the ownership and possession of the property to the slave. When the gift was perfected by delivery, the articles became the property of Mr. Devaughn, the slave's master. In a leading case on this subject, (*Fable v. Brown*, 2 Hill's Ch. 397,) the court said, "If one having good title to personal property, should transfer it into the possession of a slave, this transfer would not be void; the title would be changed, but the title and possession must be referred to the master."—See, also, *Brandon v. Huntsville Bank*, 1 Stew. 341; *Trotter v. Blocker*, 6 Porter, 291; *Leech v. Cooley*, 6 Sm. & M. 93; *Cobb on Slavery*, § 262; *Williams v. Ash*, 1 How. U. S. 13.

The judgment of the circuit court is affirmed.

ORMOND vs. MARTIN.

[BILL IN EQUITY FOR PARTITION OF LANDS.]

1. *Adverse possession by purchaser, under color of title.*—Where a purchaser enters into the possession of land under a vendor's bond, conditioned to make title by a specified day, which must arrive before a part of the purchase-money is due by the terms of the contract, his possession cannot be considered adverse to the vendor, until the day appointed for the conveyance of the title; and where such bond is executed by one who professes to act as the agent of several joint owners, for one of whom he has no authority to act, and is thus conditioned for the conveyance of title by them, the character of the purchaser's possession is the same as to all the owners.
2. *Action at law in suits for partition.*—The act of February 6, 1858 "to regulate the practice in partition suits," (Session Acts 1857-58, p. 294,) dispenses with the necessity of an action at law, to settle a controverted question of legal title arising in a chancery suit for the partition of lands.
3. *Liability for rents, and compensation for improvements.*—In a chancery suit for the partition of lands, by analogy to the rule prescribed by statute for real actions at law, (Code, § 2216,) a defendant, who holds possession under color of title, in good faith, will not be charged with rent for more than one year before the commencement of the suit; and he will be allowed compensation for the value of improvements made by him during such possession, not exceeding the amount of rents charged against him.

APPEAL from the Chancery Court at Tuscaloosa.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed, on the 12th February, 1857, by the children and heirs-at-law of John F. Martin, deceased, against John J. Ormond; and sought a partition of a certain tract of land, of which the defendant had the possession, and of which the complainants claimed to be entitled to an undivided fifth part, as tenants in common with him, together with one-fifth part of the rents accruing during the defendant's possession. The

land in controversy belonged to William A. Martin, who died in August, 1842, intestate, without wife or children, and leaving five brothers and sisters as his heirs-at-law, one of whom was John F. Martin, the father of the complainants. Letters of administration on the estate of said William A. Martin were granted, in September, 1842, to James M. Bradford, who was the husband of one of the decedent's sisters and heirs-at-law. In December, 1845, Bradford, professing to act as the agent of the heirs-at-law of said William A. Martin, all of whom were then of full age, sold the tract of land now in controversy to the defendant, and executed to him a bond for titles, dated the 19th December, 1845, and conditioned "to make to the said Ormond, and to cause to be made by the heirs-at-law of William A. Martin, a title in fee-simple to the said lands by the 1st of July next." By the terms of the contract, \$3,000 of the purchase-money was to be paid by Ormond during the then "present season," and the balance in two equal payments, of \$1577 50 each, on the 1st January, 1847, and 1848, with interest from the 1st January, 1846. Ormond entered into the possession of the land, under the contract, on the 1st January, 1846; continued in the possession up to the commencement of this suit, and erected valuable improvements. John F. Martin, the father of the complainants, died in February, 1846, having never conveyed his interest in the lands to the defendant, nor otherwise ratified the sale by Bradford; but all the other heirs of William A. Martin promptly ratified the sale, and executed conveyances to the defendant.

The defendant demurred to the bill, for want of equity, and pleaded the statute of limitations of ten years. The chancellor overruled the demurrer, and, on final hearing on pleadings and proof, rendered a decree for the complainants; holding, that the plea of the statute of limitations was not sustained by the facts, that the defendant was not entitled to compensation for improvements made by him on the land, and that he was chargeable with rent

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from the time his possession commenced. Each part of the chancellor's decree is now assigned as error.

E. W. PECK, for appellant.—1. The demurrer to the bill ought to have been sustained, because the complainants had not established their title at law.—1 Kent's Com. 364-5, note *a*; Wilkin v. Wilkin, 1 Johns. Ch. 118.; Phelps v. Green, 8 Johns. Ch. 302; Clapp v. Bromaghan, 9 Cowen, 530.

2. The plea of the statute of limitations of ten years was a complete defense to the suit. The defendant purchased the land from one who represented that he was authorized to sell, and whom he believed to be so authorized; and his possession, taken in good faith under that purchase, was under color and claim of title, and continued for more than the length of time prescribed by the statute as a bar.—Jackson v. Smith, 13 Johns. 406; Clapp v. Bromaghan, 9 Cowen, 550-56; Jackson v. Wheat, 18 Johns. 40; Jackson v. Newton, 18 Johns. 355; Jackson v. Vermilyea, 6 Cowen, 677; Smith v. Burtiss, 9 Johns. 180.

3. The defendant ought not to have been charged with rent for a longer period than one year before the commencement of the suit.—Code, § 2216.

4. If the defendant is liable for rents, he is entitled to compensation for improvements.—Jones v. Ward, 10 Yerger, 169; McKinley v. Holliday, 10 Yerger, 477; Horton v. Sledge, 29 Ala. 478.

W. COLEMAN, and S. F. HALE, *contra*.—1. There was no necessity for an action at law to establish the complainants' title.—Horton v. Sledge, 29 Ala. 478; Delony v. Walker, 2 Porter, 498; 6 Dana, 374.

2. The statute of limitations begins to run only from the commencement of an adverse possession.—Tillotson v. Doe, *ex dem.* Kennedy, 5 Ala. 410; 4 Wash. C. C. 368. The defendant went into possession under a title-bond, which expressly recognized the title to be in the heirs of William A. Martin; and his possession could not possi-

bly become adverse to them, until the 1st July, 1846, when, by the terms of the contract, their title was to be conveyed to him.—11 Ohio, 455; 12 Mass. 325; Seabury v. Stewart & Easton, 22 Ala. 217. The defendant's possession not being adverse to John F. Martin at the time of his death, and the complainants being infants at that time, the statute of limitations could not bar their rights. Nor are the facts shown which are necessary to constitute adverse possession between tenants in common. Benje v. Creagh, 21 Ala. 156; Harrison v. Pool, 16 Ala. 174; Cotten v. Thompson, 25 Ala. 680; Johnson v. Toulmin, 18 Ala. 50; 5 Wheaton, 125.

3. On the question of rents and improvements, the appellees rely on Horton v. Sledge, 29 Ala. 478, and authorities there cited.

R. W. WALKER, J.—[July 11, 1861.]—1. The land, a partition of which is sought, belonged to William A. Martin in his life-time, and on his death descended to his heirs, one of whom was John F. Martin, the father of the complainants. Ormond went into possession of the land about the 1st of January, 1846. John F. Martin (the father of the complainants) died in February, 1846. The question to be determined is, whether the possession of Ormond, commencing on the 1st January, 1846, was adverse to John F. Martin, who died in the succeeding month; for, as the complainants were minors at the death of their father, unless Ormond's possession was at that time adverse, his plea of the statute of limitations must fail.

The contract, made on the 19th December, 1845, between the defendant and Bradford, recites that Bradford, acting for himself and the heirs of William A. Martin, sold the land to the defendant, for \$6080, of which amount the sum of \$3,000 was to be paid by Ormond during the then "present season," and the balance in two equal payments, of \$1577 50 each, on the 1st January, 1847 and 1848, with interest from 1st January, 1846; and Bradford bound himself, in the penal sum of \$6,000, to make

to Ormond, and to cause to be made by the heirs-at-law of William A. Martin, a title in fee-simple to the land by the 1st July, 1846. The answers of the defendant show, that Bradford professed to be the agent of the heirs of William A. Martin, all of whom were of age; that defendant believed that Bradford was authorized to sell the land; that, so believing, he made the purchase from Bradford, relying on the power and authority of the latter to make the sale, and that he entered into the possession of, and continued to hold the land, under and by virtue of said purchase. As to all of the heirs except John F. Martin, it is shown that Bradford was authorized to make the sale; for they ratified the same, and severally conveyed to Ormond. But the interest of John F. Martin was never conveyed to Ormond; and, under the pleadings and evidence, it must be held, that Bradford had no authority to sell his share.

Where a party enters into the possession of land under a bond conditioned to make titles when the purchase-money is paid, his possession, so long as the purchase-money remains unpaid, is held to be in subordination to the title of the vendor; and in an action by the latter for the recovery of the land, the vendee cannot claim the protection of the statute of limitations, on the ground of adverse possession under color of title.—*Seabury v. Stewart & Easton*, 22 Ala. 207; *McQueen v. Ivey*, 36 Ala. 308. But, when the vendee has complied with the terms of the contract on his part, by paying the purchase-money, such a bond is color of title; and if he thereafter remain in possession, claiming the land as his own, for the period prescribed by the statute of limitations, the legal title will be barred.—*McQueen v. Ivey*, 36 Ala. 308, and cases cited. In the present case, the bond was not conditioned to make titles upon the payment of the purchase-money, but by a day named, which would arrive, according to the term of the contract, before a part of the purchase-money would be due. The precise question, whether, in such a case, the possession of the vendee can be considered adverse, before the time appointed for the convey-

ance of the title to him, has never been considered by this court. But we think that the rule deducible from the authorities is, that, until the time appointed for the conveyance of the title, a possession under such a bond must be considered as held in subordination to the title of the vendor, or person whose conveyance is stipulated for. The principle seems to be, that where one enters under an executory agreement for a future conveyance, his possession cannot be deemed adverse, until he is, by the terms of the agreement, entitled to the conveyance. See *Jackson v. Foster*, 12 Johns. 490; *Fosgate v. Herkimer Co.*, 12 Barb. 356; *Stamper v. Griffin*, 12 Geo. 457; *LaFrombois v. Jackson*, 8 Cow. 597; *Briggs v. Prosser*, 14 Wend. 228; *Jackson v. Johnson*, 5 Cowen, 74 (91-2); *Higginbotham v. Fishback*, 1 Marsh. 506.

As, by the terms of the contract, Ormond had no right to demand a deed from the heirs for whom Bradford was authorized to sell, before the 1st July, 1846, it follows, under the rule above stated, that his possession was, until then, not adverse to them. Was the case different as to the heir whose agent Bradford professed to be, but who never ratified the sale, and for whom, we must, upon this record, hold he was not authorized to act?

Every element in the definition of what constitutes a title by adverse possession, must exist; otherwise the possession will not confer title under the statute of limitations.—*Groft v. Weakland*, 34 Penn. 304. The fact of possession is but a link in the chain of title by adverse holding. It is the occupation with an *intent* to claim against the true owner, which renders the entry and possession adverse. So long as the possessor declares that he holds in subordination to the title of another, the possession cannot be deemed adverse. The question of adverse possession is, therefore, peculiarly one of intention. That it is the *intention* to claim title which makes the possession adverse, is the doctrine upon which all the decisions proceed. If it be clear that there is no such intention, there can be no pretense of adverse possession. The fact of the possession, and the *quo animo* it com-

menced or continued, are the only tests.—Angell Lim. §§ 384, 386, 390, and authorities cited.

Now, it is certain that, so far as Ormond's intention fixed the character of his possession, it was the same as to all the heirs of Martin. If he intended to hold adversely to John F. Martin, then he intended to hold adversely to the other heirs. His belief was, that he occupied the same position towards John F. Martin that he occupied towards the other heirs. His intention was to hold under the bond. He did not claim to hold otherwise than under the bond; and, as that recognized the title as in the heirs, his possession must have been in subordination to their title. Where the very instrument under which one holds recognizes the title to the land as in another person, and stipulates for a future conveyance of the same to the possessor, it is impossible in the nature of things that the latter can intend to hold adversely to the person whose title he thus recognizes.—*Authorities supra.*

The precise question we are discussing, was considered in the case of *Stamper v. Griffin*, (20 Geo. 312,) where it was held, that one who holds land under a bond for titles, in the name of the true owner, does not, so long as the purchase-money remains unpaid, hold adversely to the true owner, even though the bond be a forgery; provided he believes it to be the bond of the true owner. The argument is put in so striking a light by Benning, J., who delivered the opinion of the court, that we transcribe a portion of it.

“Possession, to be available under the statute of limitations, has to be adverse to the title of the true owner. The possession of no person can be adverse to the title of the true owner, unless the person *intends* it to be adverse to that title. No one can intend a possession to be adverse to the title of the true owner, which possession he considers himself as holding *under* the true owner. Every one who holds his possession under a bond for titles, made by the true owner, must, if the purchase-money remains unpaid, consider himself as holding under the

true owner. Therefore, no one who so holds, can intend his possession to be adverse to the title of the true owner; and therefore, the possession of no one who so holds, is adverse to that title. So equally every one who holds his possession under a bond for titles, not made by the true owner, but which he believes to have been made by the true owner, and not by some man personating the true owner, must, if the purchase-money remains unpaid, consider himself as holding under the true owner. That must be his *thought*, if he believes the bond to be genuine; whether it be genuine or not. Therefore, no one who so holds can *intend* his possession to be adverse to the title of the true owner; and therefore, the possession of no one who so holds, is adverse to the possession of the true owner. In these two sorts of possession, the result is precisely the same, whether the bond be spurious or genuine; because, in these two sorts of possession, the *intent* of the holder is the same. In each, he intends his possession to be a possession under the true owner; and intending this, he cannot intend the possession to be adverse to the true owner's title. * * * *

"To illustrate: C. is the owner of a lot of land; A. goes to B., and says to him, that he is the agent for C. to sell the lot, and sells the lot to B., with the understanding that the title is to be made by C., when the purchase-money shall have been paid by B., and that he is to get from C., for B., C.'s bond to that effect; A. brings a bond to B., with C.'s name signed to it, and delivers it as a bond of C.; the bond is a forgery; B. takes possession under it,—B. does not intend to hold adversely to C., because he *thinks* he is holding under C.; and so thinking, it cannot be supposed that he *intends* to hold adversely to C."

Having before ascertained that the possession of Ormond was not, at the death of John F. Martin, adverse to the title of the heirs for whom Bradford was authorized to sell, it follows from the principles just laid down; that it was not adverse to the title of John F. Martin, for whom Bradford (in whose assumed authority Ormond trusted) professed to be the agent.

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2. The rule of law which required an action at law, to settle a controverted question of legal title, arising in a chancery proceeding for the partition of land, is changed by statute in this State; and it is not now indispensable that such suit should be had.—Acts '57-8, p. 294.

3. Section 2216 of the Code provides, that "persons holding possession under color of title, in good faith, are not responsible for damages, or rent, for more than one year before the commencement of the suit." Although this section is part of a chapter which relates to real actions in courts of law, we think that a court of chancery should apply to a case like this, which is in the nature of an equitable ejectment, a rule analogous to that which the statute prescribes for the action at law. Hence, we think that the chancellor erred, in charging the appellant with rent for more than one year before the commencement of the suit. The appellant is entitled to the value of the improvements made by him after the 1st July, 1846, at which time the bond under which he entered became color of title; but it must be borne in mind, that he can in no event be entitled to compensation for improvements made, beyond the rents charged against him. *Horton v. Sledge*, 29 Ala. 498, and authorities there cited.

Decree reversed, and cause remanded.

BORUM vs. KING'S ADM'R.

[BILL IN EQUITY TO ENFORCE VOLUNTARY EXECUTORY TRUST.]

1. *Consideration of deed.*—Love and affection for a grandson is not a valuable consideration for a deed.
2. *Transfer of note; presumed existence of common law in sister State.*—By the common law, (which will be presumed, in the absence of evidence to the contrary, to prevail in a sister State,) to transfer

the legal title to a promissory note, without delivery, it is necessary that there should be an endorsement on the note itself, or on another paper attached to it.

3. *Voluntary executory trust not enforced.*—A court of equity will not enforce, against the grantor or his personal representative, a purely voluntary executory trust in favor of a grand-child.

APPEAL from the Chancery Court of Macon.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by William B. Borum, against the personal representative of his maternal grandfather, William King, deceased; and sought to enforce the specific execution of a trust, created by a deed of which the following is a copy:

"State of Georgia, } Know all men, by these pres-
Harris county. } ents, that I, William King, of the
State and county aforesaid, for and on account of the
relationship and love that I have for my grandson, Wil-
liam Benjamin Borum, do, by these presents, give and
convey unto my grandson one note of hand, for the
amount of \$475, on Benjamin F. Borum, the father of
my grandson, due the 30th November, 1859; and I also
give to my said grandson the further sum of \$1,000, law-
ful money, to be paid to the said William B. Borum at
my death, or within twelve months after, by my admin-
istrators or executors, as the case may be. But the note
and money above specified is given on the following con-
ditions and restrictions—to-wit: that if the said William
B. Borum should die before he arrives at the age of twen-
ty-one years, or should he die before he has a legitimate
child or children to heir and inherit it, the above
several sums of money, with the interest, is to be paid
back into the hands of my administrator or executor, and
become a part of my estate, and be divided equally among
my heirs or children—to-wit," specifying them. "And I
do by these presents constitute and appoint my son, Harvey
King, my special agent, and guardian of my said grand-
son, to manage and control the before-mentioned sum

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of money, to the best advantage, for my grandson: and [he] may, if he thinks proper, pay the interest of said money to the clothing and educating of my said grandson. It is my special request, that the money should in no wise be paid into the hands of Benjamin F. Borum, the father of my grandson, but that a guardian be appointed by the court from out of the relations of my grandson's mother, which guardian may act agreeably to the instructions above specified for Harvey King. Moreover, if I should die, and make no will, this gift to my grandson is to be considered in full of all of my grandson, and is to forever prevent him, or his father, from any claim on my estate. In witness whereof, I have hereunto set my hand and seal, this 1st December, A. D. 1840."

"WILLIAM KING, [seal.]"

"Wm. B. Pryor,
"Osborn Crook."

The bill alleged, that this deed was executed in Georgia, where the grantor then resided, was delivered by him to the complainant, "so far as the circumstances of the case would admit, and caused to be spread upon the records of the proper office"; that the grantor afterwards collected from Benjamin F. Borum the money due on said note mentioned in said deed, but never paid any part of it, or of the \$1,000 mentioned in said deed, to the complainant; that said grantor removed to Macon county, Alabama, in the year 1845, and there died in October, 1855; that letters of administration on his estate, *cum testamento annexo*, were duly granted to the defendant, who refused to pay complainant any part of said moneys; that Harvey King died in the year 1856, and that the complainant was over twenty-one years of age. The prayer of the bill was for an account, a money decree against the administrator for the amount which might be found due to the complainant, and general relief. The chancellor dismissed the bill, on motion, for want of equity; and his decree is now assigned as error.

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GEO. W. GUNN, with W. P. CHILTON, for appellant.
CLOFTON & LIGON, *contra*.

A. J. WALKER, C. J.—[July 10, 1861.]—We think it is clear that the decision of the chancellor was correct. Love and affection for a grandson is not a valuable consideration, as we decided in *Kinnebrew v. Kinnebrew*, 35 Ala. 628. The deed of William King was, therefore, purely voluntary. The deed did not convey the legal title to the note therein described. Supposing the common law to have prevailed in Georgia, where the deed was executed, the note not having been delivered, an endorsement on the paper itself, or at least on one attached to it, was necessary to transfer the legal title.—*Hall v. P. & M. Bank of Mobile*, 6 Ala. 761. We have, then, so far as the note is concerned, “an instrument purporting to be a conveyance, or assignment of property, * * * but which does not operate to divest the grantor of the legal estate (title);” and which, therefore, does not convey a perfect executed trust. The execution of such an instrument, it being purely voluntary, will not be enforced in equity against the party himself, or against his representatives after his decease.—*Hill on Trustees*, 137; *Ellison v. Ellison*, 6 Ves. 656; S. C., 1 Lead. Cas. in Eq. 167, and notes by Hare & Wallace; 2 Story’s Eq. Jur. §795 a; *Crompton v. Vasser*, 19 Ala. 259; *Kinnebrew v. Kinnebrew*, *supra*. So far as the thousand dollars mentioned in the deed is concerned, if the instrument can be regarded as operative *inter vivos*, it is settled in *Kinnebrew v. Kinnebrew*, *supra*, that the trust will not be enforced in equity. We refer to the reasoning and authorities adduced in the case last cited, as conclusive on this point. We deem it proper to remark, that the arguments and authorities of the chancellor have greatly aided us in the decision of this case, and, indeed, have left us but little to do save to concur in his conclusions.

Affirmed.

DAVIS vs. McCAMPBELL.

[PETITION FOR REHEARING AFTER FINAL JUDGMENT AT LAW.]

1. *Security for costs of appeal.*—On appeal from a judgment of the circuit court, dismissing a petition for rehearing after final judgment, (Code, §§ 2407-15,) the surety on the *supersedeas* bond, being a party defendant to the judgment appealed from, cannot become a surety for the costs of the appeal; and if there is no other surety for the costs, (Code, § 3041,) the appeal will be dismissed on motion.
2. *Rehearing at law, on account of lost receipt since found.*—Section 2407 of the Code, authorizing a rehearing after final judgment at law, on account of a lost receipt or discharge of the claim sued on, which has since been found, does not apply to a case where the action is founded on a promissory note, and the receipt only shows a payment of the original consideration of the note.
3. *Same, on account of surprise, accident, mistake, or fraud.*—Where the defendant in an action at law is required by the court, as the condition of a continuance, to confess a judgment for a part of the plaintiff's demand, and confesses judgment accordingly, he cannot afterwards obtain a rehearing as to the confessed judgment, (Code, § 2408,) on the ground of surprise, accident, mistake, or fraud.

APPEAL from the Circuit Court of Calhoun.

Tried before the Hon. S. D. HALE.

THE original action in this case was brought by James A. McCampbell, against J. L. Davis, and was founded on the defendant's promissory note for \$346 37, dated the 27th April, 1858, and payable one day after date. The defendant pleaded *not guilty*, want of consideration, failure of consideration, fraud in procuring the execution of the note, and set-off. At the May term, 1859, a judgment was rendered against the defendant, by confession, for \$175; and the cause was continued as to the residue of the plaintiff's demand. On the 3d September, 1859, the defendant filed his petition, duly sworn to, asking a *supersedeas* of the execution which had been issued on the confessed judgment, and a rehearing of the cause; and

executed a ~~supersedeas~~ bond, as required by the statute, with M. J. Turnley as his surety. The petition alleged, that the note was executed by the defendant as the administrator of the estate of one William Mallory, deceased, and was given for the amount of an open account, which the plaintiff claimed to hold against said Mallory; that one item of said account was \$180 60, paid by plaintiff to one McNutt on the 18th October, 1853, and another item was \$71 63, taxes paid by plaintiff in November, 1853,—both of said payments having been made by plaintiff, as he claimed, for said Mallory in his life-time; that the defendant, believing he had a good defense against the note, asked a continuance of the cause at the trial term, but was unable to make a satisfactory showing, and was therefore required by the court to confess a judgment, as above stated, for a part of the plaintiff's demand, as the condition on which a continuance would be granted as to the residue; and that, after the rendition of this judgment, he had found receipts showing the previous payment of the two items above mentioned, which receipts were lost or mislaid at the time the judgment was rendered. The court having overruled a demurrer to the petition, the plaintiff in the judgment filed a plea, denying the truth of the facts therein alleged; and issue was joined on said plea.

On the trial before the jury, as the bill of exceptions shows, the petitioner offered in evidence the plaintiff's answers to interrogatories under the statute, the receipts mentioned in the petition, and testimony tending to show that the judgment was confessed under the circumstances stated in the petition. The account which was the original consideration of the note, was made an exhibit to the interrogatories to the plaintiff, and also to one of the defendant's pleas to the original action; and while said account contained charges against the defendant for the two items above referred to, it gave him credits for two sums very nearly corresponding with these items, both in dates and amounts. The petitioner reserved several exceptions to the rulings of the court on the evidence,

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which require no particular notice. On all the evidence adduced, the court charged the jury, that they must find for the plaintiff in the judgment; to which charge the petitioner excepted. On the verdict of the jury, the court dismissed the petition and *supersedeas*, and rendered judgment against the petitioner and his surety on the *supersedeas* bond, for the amount of the original judgment and costs; and this judgment, together with the rulings of the court on the pleadings and evidence, is here assigned as error. A motion was submitted, on the part of the appellee, to dismiss the appeal for want of security for costs.

M. J. TURNLEY, for appellant.

MARTIN, HEPFLIN & FORNEY, *contra*.

STONE, J.—[June 28, 1861.]—As a motion has been made in this case to dismiss the appeal, for want of security for costs, we feel bound to respond to it. The appeal was taken from the judgment of the circuit court, dismissing the *supersedeas*. That judgment was rendered against J. L. Davis, and M. J. Turnley, his surety on the *supersedeas* bond; the judgment being against both of them. M. J. Turnley is the only surety for costs of the appeal to this court. Being a party to the judgment appealed from, the execution by him of the obligation intended as a security for costs, is not a compliance with section 3041 of the Code. There is no security for costs, and the appeal must be dismissed.

The appeal, however, may be amended, or a new appeal may be prosecuted, as two years have not elapsed since the judgment appealed from was pronounced. We will, therefore, dispose of the merits of the case.

[2.] We do not think the case made by the petition for *supersedeas* is within section 2407 of the Code. That section provides for a written release or discharge of the claim sued on. It contemplates a case where the release operates directly on the cause of action which is the subject of the suit. It does not reach a case like the present, where the lost paper only tends to show that the note,

which is the foundation of the action, was executed in mistake, and, to a certain extent, without consideration. If the papers relied on in the present application are worth anything, their value consists in the fact—not that they are a release or discharge of the claim on which judgment was rendered—but that such claim never had a valid existence. For such cases section 2407 of the Code makes no provision.

[3.] The appellant's case, then, must stand or fall on section 2408 of the Code. That section gives a right to a rehearing, at any time within four months after judgment, "when a party has been prevented from making his defense, by surprise, accident, mistake, or fraud, without fault on his part." The judgment in the present case was rendered on confession. To relieve himself from this record acknowledgment of the justice of the claim, the appellant shows in his proof that he had made application to the circuit court for a continuance of the suit against him, and that the circuit court required him, as a condition on which he would grant the continuance, to confess judgment for one hundred and seventy-five dollars, part of the claim sued on. This plain fact proves, that the circuit court adjudged the showing for a continuance, as to that sum, to be insufficient. The appellant thereupon accepted the terms, and confessed the judgment. This transaction had all the elements of a contract by matter of record, and the appellant cannot be relieved of it in a proceeding under section 2408 of the Code. We hold that, by a judgment confessed under the circumstances disclosed in this record, the party estops himself from afterwards litigating the matter, to the extent confessed; unless, perhaps, he might, in another forum, show that the act of confession was procured from him by fraud.

Nor can we perceive, by anything apparent on this record, that the appellant has been materially injured by the judgment which the law pronounces on his acts. He claims a credit, on 18th October, 1858, of \$180 59; he obtained a credit, according to his own showing, of \$180 on the same account, but dated October 19th, 1858. He

claims a credit of \$71 63, taxes paid; he received a credit of \$70.

Appeal dismissed.

AUTREY vs. AUTREY'S ADM'R.

[FINAL SETTLEMENT AND DISTRIBUTION OF DECEDENT'S ESTATE.]

1. *Advancements.*—Money, or property, given by a parent to a child, will be presumed to have been intended as an advancement, unless such presumption is repelled by the nature of the gift, or by other evidence showing that it was intended as an absolute gift. To show that an absolute gift, and not a mere advancement, was intended, the contemporaneous declarations of the parent are admissible evidence for the child; "and when the question arises between distributees, there is much reason, as well as authority, in support of the proposition," that the subsequent declarations of the parent, expressive of his intention in parting with the property, are admissible evidence for the same purpose. But in this case, conceding the admissibility of such subsequent declarations, and considering them in connection with the other facts proved, they are not sufficient to show that the primary court erred in deciding that the property was intended as an advancement.

APPEAL from the Register in Chancery at Claiborne, sitting as Probate Judge for Monroe county.

In the matter of the final settlement and distribution of the estate of Alexander Autrey, deceased, on the suggestion of the administrator, that the decedent had made advancements in his life-time to Anonymous B. Autrey, his son, which ought to be brought into hotchpot. On the trial of the issue joined on this suggestion, as the bill of exceptions states, "the only evidence adduced was the following":

1. The answer of said Anonymous B. Autrey, on oath, as required by the act of February 8, 1858, "to better

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ascertain advancements," &c., (Session Acts 1857-58, p. 305,) in the following words: "Affiant says, that his father, Alexander Autrey, gave him the following described property, to-wit: In the year 1828, household furniture, valued by said Alexander Autrey at the time of the gift at \$25; one negro, Albert, valued at, and worth \$400; in the year 1821, or 1822, one colt, worth \$5; in the year 1851, one negro man, Dick, valued by said Alexander Autrey at \$1,000; and in the year 1854, in cash, \$1,980. The above is the only property affiant ever received from his father, as a gift or advancement. There was property given by said Alexander Autrey to all his children; but affiant cannot positively say, whether the property was so given as an advancement, to be accounted for on the final settlement of the estate of said Alexander, or was intended as a gift to said children."

2. The testimony of Parthenia B. Autrey: "Alexander Autrey in his life-time gave to Anonymous B. Autrey, his son, one negro boy, Albert; one negro woman, Olly; also, one young horse, five or six head of cattle, four or five sheep, one bed and furniture; worth, in all, about \$1200. Said property was given about the year 1828. He also gave to said Anonymous, in the year 1853, a likely negro man, named Dick Hunter, worth about \$1,000, and \$2,000 in gold; and he also gave to said Anonymous, in the year 1855, \$2,500, as she was informed by said Alexander and Anonymous Autrey."

3. The testimony of Willis Darby: "Anonymous B. Autrey told witness, in 1854, that Alexander Autrey let him have \$2,500, given it to him at that time. Anonymous then lived in Texas, as witness was informed by him."

4. The testimony of R. T. Baggett: "Alexander Autrey told witness, in a conversation had at his fireside, that he had given away some property to his children. The words used were these: 'Now, Mr. Baggett, I don't intend that that property shall ever come back into my estate again—I gave it as a present, to help them along to live.' Immediately after that, he said that he had

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made a will, and showed it to witness, and witness read it. 'Now, the property in my possession is all that is included in that will. I have named no property in that will, only the valuation of it, which is \$12,000 worth of negro property for my living children'; \$6,000 for each of his children, if that much was on hand, in money. He then said, there would probably be thirty-five or forty negroes left for his wife, during her life; and at her death, he wanted those negroes all divided equally among his heirs, his grandchildren included. This conversation was in 1853, or 1854. Witness heard said Autrey repeat the same on other occasions subsequently, and heard him say, that what he had given his children was theirs, and not his; that he had given it to them as a present; that they had helped him to make it, and [he] wanted to see them enjoy it while he lived; and that if they spent it he could not help it. He often told witness, that he never wanted the property he had given to them to come back into his estate, or to be divided among his heirs; this was subsequent to the first conversation spoken of. Witness has heard him say the same thing, in substance, ten or twelve times, more or less." (Cross-examination.) "Said Autrey never named any property he had given to any of his children; but he told witness, that he had given more property to his sons, than to his daughters. He never told witness what his intentions were when he gave off his property to his children. In the conversations alluded to, witness can't say that said Autrey used the language, 'I never intended,' or 'I don't intend'; but thinks he said, 'I don't intend.'

5. The testimony of A. L. Autrey, a son of Anonymous B. Autrey: "About November, 1855, I went to live with my grandfather, Alexander B. Autrey, and remained with him until his death. During that time, he frequently told me, that he made advancements of property to his different children, but had always intended such advancements as absolute gifts, and did not wish or intend that they should ever be brought up on the final disposition of his estate. I have heard him say, that he

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had loaned a negro girl to Anonymous B. Autrey, to keep until he (said Alex.) could get a negro boy for him; that said negro girl died in the possession of said Anonymous, but belonged to him (said Alex.) at the time of her death, and he did not hold said Anonymous accountable for her value." (Cross-examination.) "I would further state, that I now recollect of no person being present when said Autrey and myself had the conversations mentioned above; but they were repeated frequently while I was with him. He also said, that he made a will at one time, but had destroyed it; and that he did not wish his property to be divided, or taken from those to whom he had given it, if he should die without making another will. I believe Olly was the name of the girl which said Autrey said he had given to said Anonymous. I do not know her value."

"Thereupon, the said Anonymous B. Autrey moved the court, that he be not charged with any advancements; but the court overruled his motion, and held that he was chargeable with \$6,300 as an advancement from his father, which he should bring into hotchpot"; and this ruling and decision of the court, to which an exception was reserved by the said Anonymous, is now assigned as error.

TORREY & LESLIE, for appellant.—The evidence set out in the record clearly shows, that the court below erred in charging the appellant with \$6,300 as an advancement. As no objection was made to any portion of the evidence, its admissibility was thereby conceded, and cannot now be questioned. As to the admissibility of the decedent's subsequent declarations, if the court should hold that that question can be here considered, the appellant relies on the following authorities: Phillips v. Chappell, 16 Geo. 16; Sherwood v. Smith, 23 Conn. 516; Lawson's appeal, 23 Penn. St. (11 Harris,) 85; Johnson v. Belden, 20 Conn. 322; Wentz v. Dehaven, 1 Serg. & R. 312; Butler v. Mer. Ins. Co., 14 Ala. 777; Mitchell v. Mitchell, 8 Ala. 421.

J. W. POSEY, *contra*.—The decree of the court below is

fully sustained by the evidence. The subsequent declarations of the intestate, if admissible for any purpose, are not sufficient to outweigh the other facts in proof; and they are not competent evidence.—*Rumbly v. Stain-ton*, 24 Ala. 712; *Martin v. Hardesty*, 27 Ala. 458; *Gillespie v. Burleson*, 28 Ala. 552; *May v. May*, 28 Ala. 153.

R. W. WALKER, J.—[July 3, 1861.]—The rule is, that when either money or property is given by a parent to his child, it will be presumed to be an “advancement” under the statute, unless the nature of the gift repels such presumption; as in the case of trifling presents, money expended for education, &c. But the presumption, that property given by a parent to his child was intended as an ‘advancement,’ may be repelled by evidence showing that a gift, and not an advancement, was intended; and for this purpose, the contemporaneous declarations of the parent are admissible.—*Mitchell v. Mitchell*, 8 Ala. 414, 421; *Butler v. Mer. Ins. Co.* 14 Ala. 777. And where the question arises between distributees, whether property received by one of them was intended as an ‘advancement,’ or as a pure gift, there is much reason, as well as authority, in support of the proposition, that the declarations of the intestate, made subsequent to the delivery, expressive of his intention in parting with the property, are admissible in favor of the child to whom it was delivered.—*Phillips v. Chappell*, 16 Geo. 16; *Sherwood v. Smith*, 23 Conn. Rep. 516; *Lawson’s appeal*, 23 Penn. St. R. 85; *Johnson v. Belden*, 20 Conn. 322; 2 Phill. Ev. (C. & H.’s notes, edit. of 1859,) 705.

We need not, however, decide this question in the present case; for, assuming the admissibility of all the evidence set out in this record, we are not so well convinced that the register erred in his conclusion, that we are willing to reverse his decree. The appellant filed his answer to the allegation, as required by the act of February 8, '58, (Acts '57–8, p. 305); and in that he states, that in 1828 he received “household furniture, valued by said Alexander Autrey at the time of the gift, at \$25,

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and one negro, Albert, valued at and worth \$400;" and that in 1851 he received "one negro man, Dick, valued by said Alexander Autrey at \$1,000." The fact that the property was given and received at a specified value, seems to indicate that it was intended as an advancement, and not as a pure gift. At any rate, it is clear from the appellant's answer, that the alleged intention of the intestate, that the property should be held as a gift, and not as an advancement, was not communicated to the son, either when the property was delivered, or at any time afterwards. This circumstance, we think, raises a strong presumption against the existence of such an intention. The only evidence to repel this presumption consists of the subsequent declarations of the parent, testified to by two witnesses, one of whom is the son of the appellant. The declarations detailed by the witness Baggett, are reconcilable with the idea, that the intestate intended that the property should be considered an advancement; and that all that he meant to state to the witness was, that the property which he had delivered to his children, had not been simply loaned to them, but that he had given them the absolute title. When we consider the relation of the other witness to the appellant, and the caution with which evidence of declarations, made in casual conversations, should always be received, we are not convinced that the register erred in deciding that this testimony was insufficient to overturn the presumption of an 'advancement' arising out of the other facts in the case. The record does not show that the girl Olly constituted a part of the advancements with which the appellant was charged. On the contrary, the inference from the record is, that the sum with which he was charged was exclusive of her value.

Decree affirmed.

BEDELL'S ADM'R vs. SMITH.

[ACTION FOR BREACH OF VENDOR'S TITLE-BOND.]

1. *Tender of deed, and eviction, as prerequisites to right of action on vendor's bond.*—Where the vendor has no title, and, for that reason, refuses to make a title when requested, the tender of a deed by the purchaser, to be executed, is not necessary to perfect his right of action on the title-bond; and an actual eviction of the purchaser is not necessary, since his right of action accrues so soon as the bond is broken by a failure to convey.
2. *Admissibility of declarations of vendor and his administrator, showing refusal and inability to make title.*—In an action on a title-bond, against the personal representative of the vendor, the declarations of the vendor in his life-time, and of the defendant after his qualification as administrator, showing a refusal and inability on the part of each to make title, are competent evidence for the plaintiff.
3. *Limitation of action for breach of title-bond.*—Under the law existing before the adoption of the Code, (Clay's Digest, 327, § 81,) there was no statute of limitations applicable to an action for a breach of a vendor's title-bond.
4. *Partial satisfaction of bond.*—A deed, executed by the vendor at the request of the purchaser, conveying a part of the land embraced in the title-bond, with covenants of warranty, to a third person, may be accepted by the purchaser as a partial compliance with the condition of the bond; and being so accepted, its admissibility and validity are not affected by a mistake in the description of the land conveyed, nor by the fact that the vendor had no title to that part of the land.
5. *Who is proper party plaintiff.*—The obligee is the proper party to sue for the breach of a vendor's title-bond, (Code, § 2129,) although he bought a part of the land for the use of a third person, and has sold the residue.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by George Smith, against the personal representative of Thomas J. Bedell, deceased; was founded on the decedent's penal bond, dated the 11th April, 1838, and conditioned that he should, on or before

the 25th December, 1839, make to the said George Smith "good and sufficient titles" to a certain tract of land, situated in Wilkes county, Georgia, containing three hundred and twenty acres, and described in the bond as "the east half of section number one, township nineteen, and range twenty-five"; and was commenced on the 15th September, 1857. The complaint set out the bond, and alleged as a breach of the condition, that the said decedent in his life-time, and the defendant as his administrator, had each been requested to make titles to the said tract of land, according to the condition of said bond, and had failed and refused so to do; and that neither the decedent in his life-time, nor the defendant as his administrator, had ever had a good title to the said tract of land. The defendant demurred to each breach assigned in the complaint, because there was no averment of the tender of a deed, and because there was no averment that the plaintiff had been evicted from the land. The court overruled the demurrer, and the defendant then pleaded the statutes of limitations of ten and sixteen years. There was also an agreement, "that any matter of defense might be given in evidence, as if legally and properly pleaded, and that all proper and legal replications should be considered as filed."

On the trial, as the bill of exceptions states, the plaintiff read in evidence the bond on which the suit was founded, and proved that the lands, on the 25th December, 1839, were worth \$3,000; also, "that he called on the defendant's intestate, at the maturity of said bond, and demanded of him a title to said land; that the said intestate replied, that he did not have a title, and could not then make one"; also, "that he again called on said intestate, in 1841, or 1842, and demanded a title to said lands; that said intestate replied to this demand as before, and asked for further time to comply with his bond"; "that he again called on the intestate, in 1852, and demanded titles to said lands; that said intestate replied as before, and further said, that the man had run away from whom he had purchased the land, and that he had been unable

to find him; that plaintiff thereupon told him, that he had employed counsel to bring suit on the bond; to which said intestate replied, that the statute of limitations would soon give title to the land, and that he would get a patent for the land, if plaintiff would not sue him on the bond, and make him a title, and asked for further time to make title"; "that in June, 1857, plaintiff called on defendant, and demanded a title to said lands; and that defendant replied, that she had no title to said lands, and did not know anything about the title, and had not been able to find out from whom her intestate had purchased said lands." The defendant objected to the admission of the declarations of herself and her intestate, as above stated, and reserved exceptions to the overruling of her several objections.

"The foregoing being all the evidence introduced by the plaintiff, the defendant then proved, that the plaintiff went into the possession of said lands, in 1839, and retained the possession of one hundred and sixty acres thereof for several years, and then sold the same to Miss Susannah Hugely, who went into the possession thereof immediately after the sale, and has cultivated the same, and remained in possession ever since, undisturbed; that the other half of said land was purchased by plaintiff for his mother, who went into the possession thereof in 1839, and has been in possession thereof ever since, cultivating the same as her own. The defendant offered to prove, that, on the 12th December, 1853, at the instance of the plaintiff, said intestate made a deed to Miss Hugely for one hundred and sixty acres of said land, and that plaintiff received said deed as a compliance, to that extent, with the obligation of the bond; but, because the range named in said deed was, by mistake, different from that stated in the bond, the court excluded said deed from the jury, on the plaintiff's objection; to which the defendant excepted. In connection with said deed, and the acceptance of the same by the plaintiff, the defendant offered to show, that the land described in the bond was the land intended to be conveyed by said deed; but the court ex-

cluded this evidence also, and the defendant excepted. The defendant offered to prove, also, the value of the rent of the land so possessed by the plaintiff, since the plaintiff went into the possession thereof; but the court excluded this evidence also, and the defendant excepted. The defendant also proved, that she obtained letters of administration on the estate of her intestate, on the 16th October, 1856, and, immediately thereafter, made publication as the law directs." The defendant also read in evidence two letters; one from the commissioner of the general land-office at Washington, dated the 28th December, 1857, which stated, that the land described in the bond was an Indian reservation, and was not subject to entry as public land; and the other from the plaintiff, to the defendant's attorney, dated the 27th September, 1858, and stating, that plaintiff had bought one half the land for his mother—that the title was "going" to his mother—that the suit was brought in his name, because the bond was in his name—and that the intestate had made a deed to Miss Hugely for the other half of the land.

"This being all the evidence, the court charged the jury, that, if they believed the evidence to be true, the plaintiff was entitled to recover the value of the land on the 25th December, 1839, with interest from that time to the present"; also, "that the declarations of the defendant's intestate, as proved, if they believed that they were made as proved, would prevent the statute of limitations from being a bar to this action"; and that, "the suit having been commenced within eighteen months after the grant of letters of administration on the intestate's estate, the jury had nothing to do with the plea of the statute of non-claim, and need not ascertain whether the claim was presented to the defendant before the commencement of the suit"; to each of which charges the defendant excepted.

The rulings of the court on the pleadings and evidence, and the charges to the jury, as before stated, are now assigned as error.

Bedell's Adm'r v. Smith.

THOS. H. WATTS, CLOPTON & LIGON, and N. S. GRAHAM, for appellants.—1. Each breach assigned in the complaint is demurrable, because there is no averment of the tender of a deed, and no averment of an eviction by title paramount.—Wade v. Killough, 4 Stew. & P. 450; Johnson v. Collins, 17 Ala. 324, and authorities there cited; Banks v. Whitehead, 7 Ala. 81.

2. The statute of limitations was a complete bar, under the facts proved; and neither the declarations of the intestate, nor those of the defendant, could prevent the statute from running.—Crawford v. Childers, 1 Ala. 482; McVay v. Wheeler, 6 Porter, 205; Duffie v. Phillips, 31 Ala. 573; 11 Wheaton, 309; 8 Md. Ch. 398; 16 Geo. 114; 11 Ired. 427; Angell on Lim. 247, § 28.

3. The deed to Hugely, for a part of the land, being executed at the request of the plaintiff, and accepted by him, was a partial satisfaction of the bond; at least, it ought to have been allowed to go to the jury, that they might determine whether it was so accepted.—Collins v. Johnson, 20 Ala. 435; Gibbs v. Jemison, 12 Ala. 820.

4. The first charge to the jury was erroneous for several reasons. In the first place, it was an invasion of the province of the jury, because there was a conflict in the evidence.—Allman v. Gann, 29 Ala. 240; Freeman v. Scurlock, 27 Ala. 407. In the next place, the plaintiff was not entitled to recover at all, because he was not the party really interested; having bought one half of the land for his mother, and having sold the other half to Hugely. In the next place, if the plaintiff was entitled to recover at all, the charge asserted an erroneous measure of damages.—Whitesides v. Jennings, 19 Ala. 784.

GUNN & STRANGE, *contra*.—1. The complaint alleges facts which dispense with the necessity of averring an eviction and the tender of a deed.—Johnson v. Collins, 17 Ala. 318; Garnett v. Yoe, 17 Ala. 74; Allen v. Greene, 19 Ala. 34.

2. The statute of limitations prescribed by the Code, (§ 2476,) does not govern the case, because only four years

intervened between the adoption of the Code and the commencement of the suit.—*Henry v. Thorpe*, 14 Ala. 103; *Rawls v. Kennedy*, 23 Ala. 420. The act of 1802 (*Clay's Digest*, §27, § 81) does not include penal bonds conditioned for any thing else than the payment of money. *Williams v. Talbot*, 16 Tex. 1; 7 Johns. Ch. 556; 1 Saunders, 38; 17 Johns. 165; 83 Penn. St. R. 485; 2 Martin's La. (N. S.) 545; 4 Texas, 159; 16 Arkansas, 122; 21 Barbour, 351.

3. If the statute of limitations be applicable to the case, the repeated promises of the intestate would prevent its operation.—*Evans v. Carey*, 29 Ala. 99; 30 Vermont, 262; 14 Geo. 661; 8 Rich. (S. C.) 118.

4. The admissions of the defendant and her intestate, having been acted upon by the plaintiff, were not only competent evidence, but might amount to an estoppel. *Garrett v. Garrett*, 27 Ala. 651; *Gwynn v. Hamilton*, 29 Ala. 232.

5. The deed to Hugely could have nothing to do with the case, because the land conveyed by it was not the land mentioned in the bond; and because, if the land had been the same, the grantor had no title to it.

A. J. WALKER, C. J.—[June 18, 1861.]—The declaration was not objectionable, for the want of an averment of the tender of a deed to be executed by the defendant's intestate; because it shows that the vendor had no title, and also that he refused to make a title, when requested, for the reason that he had none. The law does not require the useless ceremony of the preparation and tender of a deed under such circumstances.—*Johnson v. Collins*, 17 Ala. 318; *Garnett v. Yoe*, *ib.* 74. The plaintiff had a right of action as soon as the condition of the bond was broken by a failure to convey; it was not necessary that there should have been an eviction of the plaintiff before the action was brought; and, of course, an averment of such eviction in the declaration was not indispensable. Having thus found the only two objections to the declaration urged in this court to be untenable, we decide that

there was no error in overruling the demurrer to the declaration.

[2.] The declarations of the defendant and her intestate conducted to show, both a refusal on the part of the declarants to make title, and an inability to do so; both of which were important facts in this case. For that reason, and probably for other reasons, those declarations were admissible evidence.

[3.] The plaintiff's cause of action accrued before the Code went into operation, and is subject to the statute of limitations existing before that time.—Pamphlet Acts of '58-54, p. 71; *Martin v. Martin*, 85 Ala. 560. In the law existing at the time when the Code went into operation, there was no statute of limitations applicable to a suit upon a penal bond, conditioned for the discharge of a duty, and not for the payment of money. The act of 1802, which prescribes a limitation of sixteen years, includes only actions upon leases under seal, single or penal bills for the payment of money only, obligations with condition for the payment of money only, and awards under the seals of arbitrators for the payment of money only.—Clay's Digest, 327, § 81. A bond conditioned, as is the one here in suit, to make a title to land, is obviously not a cause of action embraced within that statute. It results, that there was no error in any ruling of the court adversely to the defense of the statute of limitations.

[4.] We think the court erred in excluding the deed offered in evidence. The purpose of its offer was to show the acceptance of an act as a compliance, *pro tanto*, with the condition of the bond; and we think it ought to have been admitted in evidence, in connection with proof of its being made at the request of the plaintiff, and of its acceptance by him, as a compliance with the condition of the bond *pro tanto*. It is true, parol evidence was not admissible, to show the mistake in the description of the land. Such evidence would only be admissible in a direct proceeding for the reformation of the deed. The deed offered in evidence contains a warranty of title, upon which

the grantor would be responsible. Now the giving of this deed, with a covenant of warranty, although the grantor may have had no title to the land described in it, was a valuable consideration to support the plaintiff's agreement to accept it as a compliance, *pro tanto*, with the condition of the bond, or as a satisfaction of it *pro tanto*; and that agreement, being thus sustained by a valid consideration, must be upheld. If it were not, it would result that, while the defendant would be denied the benefit of it in this suit, she might be held responsible at the suit of the third person, in whose favor the deed was made, for a breach of warranty. If the deed were reformed, the case would not be changed. The warranty in it would still be a valuable consideration for its acceptance as a partial satisfaction of the bond; and it would be most unreasonable, that the defendant should be deprived of the benefit of the partial satisfaction, and still held under responsibility to a third person, upon the covenants of a deed given in consideration of the agreement that it should be a partial compliance with the bond.

[5.] We do not think there is any thing in the point that the suit is not in the name of the proper party plaintiff.

Reversed and remanded.

STUBBS vs. BEENE'S ADM'R.

[SETTLEMENT OF INSOLVENT ESTATE—CONTEST AMONG CREDITORS.]

1. *Variance in description of claim.*—When an attorney's receipt for a note, placed in his hands for collection, is filed as a claim against his insolvent estate; and the accompanying affidavit of the creditor states, that the attorney failed, through negligence, to present and file the note as a claim against the insolvent estate of the deceased debtor,—proof of the attorney's admission that he had col-

lected the money on the note, and of his promise to pay it, is not competent evidence for the creditor.

2. *Duty and liability of attorney.*—An attorney, receiving a note for collection, is not bound to file it as a claim against the insolvent estate of the deceased debtor, and is not guilty of any negligence in failing to file it, when it appears that the debtor was living at the time the note was put in his hands, and it is not shown that he had knowledge of the debtor's subsequent death.
3. *Sufficiency of claim.*—When an attorney's receipt for a note, placed in his hands for collection, is filed as a claim against his insolvent estate, its failure to specify the amount of the note is no objection to the claim, provided the amount be shown by other proof.

APPEAL from the Probate Court of Dallas.

IN the matter of the estate of Benjamin Y. Beene, deceased, which was declared insolvent by said probate court, and against which J. B. & T. Stubbs filed as a claim, within the time prescribed by law, a receipt, signed by the intestate, in the following words: "Received for collection, of Valentine Kirkpatrick, a note drawn by J. Gibson, in favor of J. B. & T. Stubbs, Dec. 1, 1853." The accompanying affidavit of J. B. Stubbs, attached to the receipt, stated, that the note on said Gibson was dated the 9th July, 1853, and was for \$180; that Gibson died, his estate was declared insolvent, and finally settled in December, 1855; "and that said Beene did not present said note to the administrator of said Gibson's estate, nor did he file it in the probate court of Dallas county, but wholly neglected to do so; whereby deponent has lost the collection of said amount by the gross negligence of said Beene as attorney." The administrator filed written objections to the allowance of the claim, "because the affidavit is not sufficient, and there is no proof that the note could have been collected." On the trial of the issue it appeared, "that Gibson, the maker of the note specified in the receipt, died in Dallas county, during the year 1854; that his estate was duly declared insolvent by said probate court, and settled in the early part of the year 1856, paying the creditors a *pro-rata* dividend of fifty-two cents on the dollars; that said note was not presented by

said Beene, nor was it allowed as a claim on the final settlement of said estate. It further appeared, by the evidence of one Lloyd, that, some time during the summer of 1856, he received said receipt from the plaintiffs, who resided in the city of Montgomery, to be presented to said Beene; that he did present the same, in order to receive the sum coming from said Gibson's estate; that Beene told him, that he had collected the money, but was about leaving home, and would settle when he came back, and that said Beene did leave home, and afterwards died on the 29th August, 1856. After hearing the above evidence, and the arguments of counsel, the plaintiffs moved the court to allow their claim, or so much thereof as could have been collected from said Gibson's estate, if it had been presented. The court intimated the allowance of the claim; but, after the decision of the court was thus intimated, one of the administrator's counsel, who was keeping an account of the claims allowed and rejected, perceived that no amount was specified in the receipt, and thereupon moved the court to re-consider its judgment, or intimation, as to the allowance of the claim. The plaintiffs objected to this, because the objection, if available at all, came too late; but the court overruled their objection, and rejected their claim; to which the plaintiffs excepted." The rejection of the claim is now assigned as error.

J. Q. SMITH, and J. T. MORGAN, for appellants.

ALEX. & JNO. WHITE, *contra*.

STONE, J.—[June 19, 1861.]—The claim set up by appellants, against the estate of Mr. Beene, does not rest on the averment of the Messrs. Stubbs, that intestate had collected their demand, and thereby rendered himself liable for its payment. The affidavit of verification seeks to charge him for failing to file the claim against the estate of Mr. Gibson, "whereby deponent has lost the collection of said amount by the gross negligence of the said B. Y. Beene as attorney." In this aspect of the case, we

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can not regard the evidence of the witness Lloyd, who testified, that Mr. Beene admitted to him that he had collected the money, and promised to pay it. To receive such evidence, would violate the rule which requires that the proof shall correspond with the allegation, and would probably inflict great wrong and oppression in the surprise to the administrator, to which such practice would almost certainly lead.

[2.] The simple question presented by the record is, was it the duty of Mr. Beene, an attorney-at-law, who received the claim for collection by suit, to file such claim against the estate of the debtor for allowance; the debtor dying after the claim was received by the attorney, and there being no evidence that the attorney knew, either that the debtor had died, or that his estate had been declared insolvent. It must be conceded, that an attorney-at-law, who receives a claim for collection, in the absence of proof to the contrary, will be presumed to have received it for collection by suit; and that, by the implied terms of such contract, he is required to give his professional skill and attention to all the ordinary stages of the litigation.—See *Mardis v. Shackelford*, 4 Ala. 498; also, *Smedes v. Elmendorf*, 3 Johns. 187. So, if any cross litigation be instituted, which bears directly on the further progress of the suit under his control, it is possibly his duty to represent his client in such defensive cross litigation.—*Dearborn v. Dearborn*, 15 Mass. 316; *Smallwood v. Norton*, 20 Maine, 87. But those matters which lie outside of the regular line of professional attorneyship, and which partake rather of the character of agencies, rest on a different principle. While an attorney may lawfully perform many of these agencies, he is not, in the absence of an express engagement to do so, bound to perform them. They are not among the implied obligations he incurs, when he assumes the relation of attorney for another.—*Matter of Dakin*, 4 Hill, (N. Y.) 42; *In re G. Chitty*, 2 Dowl. Pr. Cases, 421; *Ollin v. Stetson*, 12 Me. 244; *Anon.* 19 Wend. 87. See, also, as to attorney's powers, *Albertson v. Goldsby*, 28 Ala. 711; *Wycoff v.*

Bergen, Cox, (N. J.) 214. To constitute a valid filing of a claim against an insolvent estate, an affidavit must be made, verifying the claim, "by the oath of the claimant, or some other person who knows the correctness of the claim."—Code, § 1847; Lay v. Clark, 31 Ala. 409; Carhart v. Clark, *ib.* 396. This affidavit could not always be made by an attorney, for he might not have the requisite knowledge. We hold that, on the evidence in this record, the present claim was not a proper charge against Mr. Beene's estate. Whether, if it had been shown that Mr. Beene knew of the death of Mr. Gibson, it would not have been his duty to give notice to his client, who lived in another county, we need not and do not decide.

[3.] There was nothing in the objection, that Mr. Beene's receipt failed to specify the amount of the note on Mr. Gibson, provided the proof showed the amount. Affirmed.

WILSON vs. SAWYER.

[ACTION AGAINST SHERIFF, FOR MONEY HAD AND RECEIVED.]

1. *Sheriff's right to commissions for execution of process regular on its face, but issued on void judgment.*—A sheriff is not entitled, as against the defendant in execution, to retain his commissions out of the proceeds of the sale of property under an execution regular on its face, but issued on a judgment which is void on account of the incompetency of the presiding judge; although the statute (Code, § 2284) protects him in the execution of such process.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. JAMES B. MARTIN.

THIS action was brought by John B. Wilson, against Henry J. Sawyer, to recover the sum of about \$250,

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money retained by the defendant as his commissions, as sheriff, on the sale of property under an execution against the plaintiff; and was commenced on the 18th August, 1860. The execution was issued, on the 18th March, 1858, on a decree rendered by the probate court, on the 9th March, 1858, in favor of Martha J. Wilson, against the plaintiff; went into the hands of the defendant, as sheriff of the county, and was by him levied on the plaintiff's property; and the property was sold, under said execution, in July, 1858, and brought about \$8,500. The decree of the probate court, on which said execution issued, was reversed by this court, at its June term, 1860, (before the commencement of the present suit,) and the cause remanded; the reversal being placed on the ground, that the decree was void on account of the incompetency, from interest, of the probate judge before whom the proceedings were had.—See the case reported in 36 Ala. 655. All the facts of that case, as shown by the printed report, were in evidence, and were admitted to be there correctly stated; and it was agreed, that the report might be considered a part of the bill of exceptions. It was further admitted, "that said execution was regular on its face in all respects." This being all the evidence, the court instructed the jury, if they believed the evidence, to find for the defendant; to which charge the plaintiff excepted, and he now assigns the same as error.

ALEX. & JNO. WHITE, for appellant.

S. & J. T. LEIPER, *contra*.

R. W. WALKER, J.—[June 19, 1861.]—The question presented by this record is, whether a sheriff, who has sold property under a *fi. fa.* regular on its face, but issued upon a judgment which was void, because the judge was incompetent to try the case, (Code, § 560; *Wilson v. Wilson*, 36 Ala. 655,) is entitled, as against the defendant in the execution, to retain his commissions out of the proceeds of the sale.

The Code provides, that "whenever it appears that the

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process is regular on its face, and is issued by the competent authority, a sheriff, or other ministerial officer, is justified in the execution of the same, whatever may be the defect in the proceeding on which it was issued."—Code, § 2284. This section was designed to give legislative sanction to the just and salutary rule, adopted by some courts independently of legislation, that ministerial officers are not responsible for executing any process regular on its face, if the court from which it issues has general jurisdiction to award such process, although it had not jurisdiction in that particular case.—See *Rogers v. Mulliner*, 6 Wend. 597; *Lewis v. Palmer*, *ib.* 367; *Savacool v. Boughton*, 5 Wend. 170; *Coon v. Congden*, 12 Wend. 496; *People v. Cooper*, 13 Wend. 379, 384; *Noble v. Holmes*, 5 Hill, 194; *People v. Warren*, 5 Hill, 440; *Watson v. Watson*, 9 Conn. 140; *Jones v. Hughes*, 5 Serg. & R. 299; *Forward v. Marsh*, 18 Ala. 645, 648; *Clarke v. May*, 2 Gray, 410; 3 Phil. Ev. (C. & H. notes, ed. 1848,) pp. 990, 107–8–9, 1078.

But the rule which justifies an officer, who acts under process apparently regular, though really void, is one of protection merely. "It is a shield, but not a sword. The officer, when sued, may defend under such process; but he cannot build up a title upon it, which will enable him to maintain actions against third persons."—*Horton v. Hendershott*, 1 Hill, 118; *Sturbridge v. Winslow*, 21 Pick. 83, 87.

The execution in this case, though regular upon its face, was in fact void, and, in the very nature of things, no right can arise out of it. The statute exempts the sheriff from responsibility; but it was not designed to reward or compensate him for executing such process. It would be most unjust, indeed, to take the property of a citizen to pay for the execution of process against him which was issued without authority of law. The principle is a sound one, that "no right can be derived from an unlawful act, in favor of a sheriff who does the unlawful act." (*Collier v. Windham*, 27 Ala. 294;) and hence we conclude, that where the judgment is void, the sheriff is not entitled

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to commissions for executing the *fi. fa.* issued upon it.—
See Nowlin v. McCalley, 31 Ala. 682.

Judgment reversed, and cause remanded.

SMITH vs. JOHNSON.

[PROCEEDING BEFORE PROBATE COURT FOR ASSIGNMENT OF DOWER.]

1. *Validity of contract contravening policy of public land-laws.*—A contract between A and B, by which it is agreed, that the former shall enter a tract of land, under the graduation act of 1854, (10 U. S. Statutes at Large, 574,) in his own name, but for their joint use and benefit, and that the latter shall furnish the purchase-money,—being in contravention of the policy of that statute, as indicated by the affidavit required of the party making the entry, is illegal and void.
2. *Specific performanse of illegal contract.*—A court of equity will not decree the specific execution of a contract which is illegal and void, because in contravention of the policy of the public land-laws, although the party asking it is in possession of the land, and has made valuable improvements.
3. *When probate court may assign dower.*—In proceedings before the probate court for an assignment of dower, (Code, §§ 1360-72,) it is no defense to the application, that the lands in which dower is sought, and of which the decedent died seized and possessed, are in the possession of a third person, who claims an undivided half interest in them, under a contract between him and the decedent, by which it was agreed, that the latter should enter the lands under the graduation act of 1854, in his own name, but for their joint use and benefit, and with money furnished by the former: such contract being illegal and void, the person in possession is not an alienee of the decedent, and the fact that he has made valuable improvements on the land does not take away the jurisdiction of the probate court.

APPEAL from the Probate Court of Barbour.

IN the matter of the petition of Mrs. Anna E. Smith, formerly the widow of Emanuel Johnson, deceased, for

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an assignment of her dower in the lands of her said deceased husband. The decedent died on the 14th February, 1856, and the petition was filed on the 6th April, 1859. William W. Johnson, who was the administrator and brother of the decedent, and who had possession of the lands in which dower was sought, contested the petitioner's right to dower; contending that the decedent had aliened to him an undivided half interest in the lands, and that therefore the probate court had no jurisdiction to assign dower to the petitioner; and pleading the statute of limitations of three years. It appeared on the hearing of the petition, as the bill of exceptions shows, that the decedent entered the lands, at the land-office in Elba, at twenty-five cents per acre, under the act of congress approved August 4, 1854, commonly called the "graduation act"; that the purchase-money, with which the entry was made, was furnished by the contestant; that the entry was thus made, and the purchase-money thus furnished, in pursuance of a verbal contract between the decedent and the contestant, by which it was further agreed, that the entry was to enure to their joint use and benefit,—each party to have one half of the land. It further appeared, that the decedent, after entering the land, deposited the certificates of entry with Mrs. Sarah Johnson, who was the mother of himself and the contestant, "requesting her to keep them for himself and William until the lands should be divided, and stating, at the same time, that one half of the lands belonged to said William"; that he repeatedly afterwards disclaimed the absolute ownership of the land, and admitted that one half of it belonged to the contestant; that he and the contestant jointly occupied, cultivated, and improved the land, up to the time of his death; that the contestant then continued in the possession, cultivated and improved the land, by clearing, erecting fences, &c., and returned one half of it in his inventory, as administrator of the decedent's estate, as belonging to said estate; and that the land had never been divided between them, nor otherwise disposed of. On these facts, the probate dismissed

the petition; and its judgment thereon, to which the petitioner excepted, is now assigned as error.

J. BUFORD, for appellant.—It is against public policy that lands should be entered, under the graduation act, by one person for the use of another; and the party making the entry is required by the statute to make oath to the contrary.—Dunlop's Digest U. S. Laws, 1442. The alleged contract between the decedent and the contestant, being against public policy, was illegal and void, and would not be specifically enforced by a court of equity.—Dial v. Hair, 18 Ala. 798; Evans v. Kittrell, 83 Ala. 449; Story on Contracts, §§ 545, 569, 581, 615; Story's Equity, §§ 751, 769. As the contestant had neither a legal title to the land, nor such an equitable interest as might be enforced in chancery, he cannot be considered an alienee or purchaser from the decedent, within the contemplation of section 1369 of the Code.

PUGH & BULLOCK, *contra*.—If the contract between the decedent and the contestant, and the partial performance thereof, as disclosed by the evidence, amounted to a valid alienation of the land, the petition was properly dismissed—1st, because the court had no jurisdiction; and, 2d, because the statute of limitations was a complete bar. Code, §§ 1369, 1872; Session Acts 1857–8, p. 47; 23 Ala. 616. The payment of the purchase-money, possession under the contract, the erection of valuable improvements, and the continued admission, by word and deed, of the contestant's title, take the case out of the operation of the statute of frauds. The only question, then, is, whether the validity of the contract is affected by the graduation act, under which the entry was made. But, if the contract be void, as being contrary to the provisions or policy of that statute, then the entry also is void, and the petitioner has no title. The contestant has possession, and relies on the maxim, *potior est conditio possidentis*; and the petitioner cannot assail his title, without at the same time destroying her own.

A. J. WALKER, C. J.—[June 17, 1861.]—All the objections made to the appellant's petition, rest, as their basis, upon the ground that the appellee was a purchaser from the appellant's former husband, of a moiety of the land in which dower is claimed. The purchase is claimed to have resulted from a contract made between the appellant's deceased husband and the appellee, that the former should enter the land, under the act of congress entitled, "an act to graduate and reduce the price of the public lands to actual settlers and cultivators," and that the appellee should furnish the entrance money; which contract was followed by an entry of the land, in pursuance of it, with money supplied by the appellee, and the subsequent joint occupation and improvement by the deceased and the appellee. This contract, being parol, was within the statute of frauds.—*Henly v. Brown*, 1 St. 144; *Kizer v. Lock*, 9 Ala. 269. From this it results, that the appellee could have acquired by the agreement, the payment of money according to its terms, and the subsequent improvement, a right to go into equity for a specific performance of the parol contract; which right might be denominated an equitable title to the land, if, under the facts, a court of equity would have granted the specific performance. It follows, that the entire question, whether any right to the land ever vested in the appellee, depends upon the sufficiency of his claim to a specific performance in a court of equity.

[1.] The third section of the graduation act of congress, above referred to, requires, as a preliminary to the entry of land under it, an affidavit of the applicant, that he enters the same for his own use, and for the purpose of actual settlement and cultivation, or for the use of an adjoining farm or plantation owned or occupied by him; and that, together with the entry, he has not acquired from the United States, under the provisions of the act, more than three hundred and twenty acres, according to the established surveys.—10 U. S. Statutes at Large, 574. The agreement above set forth comes directly within the inhibition contained in the affidavit required, and would

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be illegal and void, upon the principles settled in *Tennison v. Martin*, (18 Ala. 21,) *Hudson v. Milner*, (12 *ib.* 667,) and *Dial v. Hair*, (18 Ala. 798.)

[2.] Because the contract is illegal and void, a court of equity would not compel a specific performance of it, notwithstanding the party seeking the specific performance might be in possession.—*Dial v. Hair*, *supra*. It is a maxim, that *in pari delicto potior est conditio possidentis*. But this maxim was never designed to infringe the principle, that the courts will not aid in the enforcement of a contract violative of the law. In this case, the appellee seeks to set up an illegal contract, for the purpose of showing an equality of fault in the making of such contract, in order that he may obtain the benefit of it.

[3.] As there was no contract by which, either in equity or at law, any right vested in the appellee, it can not be said that there was any alienation by the deceased, or that the appellee was an alienee.

The entire defense, upon which the appellant's petition was resisted, is untenable; and therefore the decree of the court below is reversed, and the cause remanded.

**DOUGLASS vs. MONTGOMERY & WEST POINT
RAILROAD COMPANY.**

[ACTION AGAINST RAILROAD COMPANY, AS COMMON CARRIER, FOR NEGLIGENCE.]

1. *When nonsuit, with bill of exceptions, may be taken.*—A nonsuit may be taken, with a bill of exceptions, (Code, § 2357,) in consequence of the suppression of the plaintiff's deposition, on motion, before the trial is entered upon.
2. *Competency of plaintiff, in action against common carrier, to prove contents and value of lost baggage.*—In an action against a railroad company, as a common carrier, to recover damages for the loss of a

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passenger's baggage, the plaintiff may prove the contents and value of his trunk by his own oath.

3. *When deposition of party may be taken.*—When a party is competent to testify in his own favor, his deposition may be taken, as in case of other witnesses.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by Jules Douglass, against the appellee, as a common carrier, to recover damages for the loss of the plaintiff's baggage while traveling on the defendant's railroad between Montgomery, Alabama, and Columbus, Georgia. When the cause was called for trial, as the bill of exceptions states, and the plaintiff had announced himself ready, the defendant submitted a motion to suppress the plaintiff's deposition, (which had been taken on interrogatories and cross-interrogatories,) on the grounds—"1st, that there is no law authorizing the taking of the deposition of a party plaintiff; and, 2d, that the plaintiff was not competent to testify in his own favor." At the time of filing cross-interrogatories, the defendant had also objected to the taking of the deposition, "on the ground that the law does not authorize the plaintiff to be examined, to prove the correctness of his demand, in a suit against a corporation." The plaintiff then showed to the court, that he resided in the city of Baltimore, Maryland, which was more than one hundred miles from Montgomery, and that his deposition had been taken on that account; and stated, that he only proposed to read in evidence so much of his deposition as tended to prove the contents and value of his lost baggage, and to make out the rest of his case by evidence *aliunde*. The court sustained the defendant's motion, and refused to allow the plaintiff to use any part of his deposition for any purpose. The plaintiff excepted to this ruling of the court, and, in consequence thereof, at the next term, took a nonsuit; and he now assigns said ruling as error, and moves to set aside the nonsuit.

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W. A. GUNTER, for appellant.—On principles of public policy and necessity, the plaintiff, in an action against a common carrier for negligence, may prove the contents and value of his lost baggage by his own oath, after establishing the delivery and loss by other competent testimony.—1 Greenl. Ev. §§ 82, 848; *Herman v. Drinkwater*, 1 Greenl. Rep. 27; *Clarke v. Spence*, 10 Watts, 335; *Gilmore v. Bowden*, 3 Fairf. (Me.) 412; 1 Yeates, 34; 2 Watts & Ser. 369; 3 Barr, 451; 10 Barr, 45; Story on Bailments, § 454, note 4; 2 Smith's Leading Cases, (H. & W.'s Notes,) 131.

2. If the plaintiff, being present, was competent to testify for himself, his deposition might be taken as in case of any other witness.—*Moore v. Hatfield*, 8 Ala. 442.

GOLDTHWAITE, RICE & SEMPLE, *contra*—1. Section 2357 of the Code authorizes a nonsuit, with a bill of exceptions, only from decisions made "on the trial of a cause;" that is, after the trial has begun. That this statute is to be strictly construed, see *Palmer v. Bice*, 26 Ala. 430. In this case, the motion to suppress the deposition was made, as the statute (Code, § 2323) requires it should be made, "before entering on the trial;" and the nonsuit was taken at the next term.

2. The plaintiff was not competent to testify in his own favor.—1 Greenl. Ev. (7th ed.) § 848, note 4; *Snow v. Eastern Railroad Co.*, 12 Metcalf, 44.

3. If he was competent, there is no statute authorizing his deposition to be taken. Section 2318 of the Code applies only to *witnesses*, and does not include *parties*.

STONE, J.—[June 18, 1861.]—It is urged by appellee that, inasmuch as the decision of the circuit court, which is sought to be reviewed, was pronounced on a motion made and heard before the trial was entered upon, the case is not within the provisions of section 2357 of the Code, which applies only to decisions of the court made *on the trial* of a cause. The argument is not defensible. Section 2353 of the Code confers the power of reserving,

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by bill of exceptions, "any charge, opinion, or decision of the court, which would not otherwise appear of record." Yet this section contains almost the identical words which are found in section 2357. Its language is, "Either of the parties in any civil case, *during the trial of the cause*, may reserve by bill of exceptions," &c. If we were to confine the operation of section 2357 to decisions pronounced on the final trial, by the same rule we would be required to limit the operation of section 2358 to charges, opinions, and decisions, made during the trial in chief. Yet it is the universal practice, sanctioned by repeated decisions of this court, to reserve by bill of exceptions questions arising on decisions pronounced in the preparatory stages of the suit, provided those decisions bear on the final result; and questions thus reserved are reviewed in this court.—*Shepherd & Gordon v. Spriggs*, 29 Ala. 673; *Peavey v. Burket*, 35 Ala. 141. We place the same construction on each cited section of the Code, and hold that we will consider of the question.

[2.] The main question in this cause has not before been considered in this court. We confess that, whatever rule we may declare, we perceive probable hardship and injustice in its application. Corrupt men may pervert the privilege of being witnesses in their own causes, to their personal profit; while, on the other hand, to deny to a party the right of testifying in a case like the present, is almost the equivalent of withholding from the traveling public all remedy for losses of their baggage. As we said on a former occasion, the "result of the introduction of steamboats and railroads is, that common carriers have, to a great extent, taken exclusive possession of the public thoroughfares of the country."—*Steele & Burgess v. Townsend*, at the last term. So, we may add, that railroads and steamboats have almost a monopoly of the public travel on their respective routes. The traveler is under a moral necessity to accept the car or the boat's cabin; and it is part and parcel of that necessity that he shall submit his valuables to the care and control of the employees of such public lines of conveyance. To require of

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a traveler, whose baggage has been lost while in transit on a railroad, that, the loss being established by other testimony, he shall also prove by disinterested witnesses each article of his wardrobe and its value, is simply to declare railroads cannot be held accountable for their faults and breaches of contract, because of a defect in the law.

We are aware that, in the case of *Snow v. Eastern Railroad Co.*, (12 Metc. 44,) the supreme court of Massachusetts, in a case like the present, excluded the evidence of the plaintiff; holding, that the rule only applied where the defendant, or the employees of the defendant, had been convicted by other evidence of an act of spoliation, or of felony. But the authorities explode this distinction. In a case against a common carrier before Montague, B., "a question arose about the things in a box; and he declared, that that this was one of those cases where the party himself might be a witness *propter necessitatem rei*. For every one did not show what he put in his box."—12 Viner's Abr. 24, pl. 34. Mr. Greenleaf says, "Such evidence is admitted, not solely on the ground of the just odium entertained, both in equity and at law, against spoliation, but also because, from the necessity of the case and the nature of the subject, no proof can otherwise be expected; it not being usual even for the most prudent persons, in such cases, to exhibit the contents of their trunks to strangers, or to provide other evidence of their value. For, where the law can have no force but by the evidence of the person in interest, there the rules of the common law, respecting evidence in general, are presumed to be laid aside; or rather, the subordinate are silenced by the most transcendent and universal rule, that in all cases that evidence is good, than which the nature of the subject presumes none better to be attainable."—1 Greenl. Ev. § 348, and authorities cited. See, also, Cow. & Hill's Notes to Phil. Ev. (3d ed.) vol. 1 of Notes, 56–7; and authorities on appellant's brief. We hold, that the plaintiff was a competent witness, to testify of the contents of his trunk, and the values of the several articles.

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[3.] Having ascertained that the plaintiff was a competent witness to testify in his own behalf, to the extent to which his testimony was offered, the right existed to take his testimony by deposition, as in case of other witnesses.—Code, § 2318; *Moore v. Hatfield*, 3 Ala. 442.

Judgment of the circuit court reversed, nonsuit set aside, and cause remanded.

TAYLOR vs. STRICKLAND.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *General objection to deposition.*—A separate objection to "each sentence of each deposition," is nothing more than a general objection to each deposition; and if each deposition contains some legal evidence, such objection may be overruled entirely.
2. *Mistake in payee's name in note.*—When a promissory note is, by mistake, made payable to Aaron *Formey*, instead of Aaron *Formby*, the latter may sue upon it in his own name, alleging that it was made payable to him by the name therein inserted, and may prove on the trial, by parol evidence, that he was the person intended; and his assignee may sue in like manner, making the same averments and proof. (Overruling *Gayle v. Hudson*, 10 Ala. 116.)

APPEAL from the Circuit Court of Randolph.

Tried before the Hon. JAMES B. MARTIN.

THIS action was brought by Wilson Strickland, against Jesse R. Taylor; and was founded on a promissory note, of which the following is a copy:

"On or before the 1st January, 1858, I, as trustee for Mary Ann Taylor and Eliza Ann Taylor, promise to pay Aaron Formey, or bearer, four hundred dollars, being balance of purchase-money for land near Rock Mills, in Randolph county, Alabama, value received, September 20, 1856."

(Signed)

"JESSE R. TAYLOR."

The amended complaint contained two counts; the first describing the note as payable to Aaron Formby, and alleging that it was the property of the plaintiff; and the second averring, that it was made payable to Aaron Formby, by the name of Aaron *Formey*. The defendant demurred to the amended complaint, "on the ground that the note therein specified cannot be sued on, and a recovery had thereon in a court of law, before said note is reformed in a court of chancery"; and his demurrer being overruled, he pleaded the general issue, with leave to give any special matter in evidence.

On the trial, as the bill of exceptions shows, when the plaintiff offered to read to the jury the note above copied, the court excluded it on the defendant's motion. The plaintiff then offered said note in connection with the depositions of several witnesses, who testified, in substance, to a sale of land by Aaron Formby to the defendant, and the execution of a note for \$400 by the latter, for a part of the purchase-money. The defendant "objected separately to the depositions of each of said witnesses, and also objected separately to each sentence of each deposition, and also objected separately to the reading of said note as evidence." The court overruled each of these objections, and allowed the note and depositions to be read to the jury; and the defendant excepted.

The court charged the jury, "that, if the note sued on was made by the defendant, payable to Aaron Formby, by the name and style of Aaron *Formey*, and delivered to him, then the plaintiff was entitled to recover; and that, in determining whether said note was made payable to Aaron Formby, by the name of Aaron *Formey*, they might look to any evidence showing a sale of land by said Aaron Formby to said defendant, at the time said note was given, if there was any such evidence before them." The defendant excepted to this charge, and requested the court to instruct the jury, that they could not find for the plaintiff, although they might believe all the evidence in the cause, and although they might believe that the

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name of Aaron Formey was inserted in the note by mistake, instead of Aaron Formby. The court refused these charges, and the defendant excepted to their refusal.

The several rulings of the court on the pleadings and evidence, the charges given, and the refusal of the charges asked, are now assigned as error.

HEFLIN & FORNEY, for appellant, cited Gayle v. Hudson, 10 Ala. 116; Mims v. Flournoy, 17 Ala. 36; Mims v. Shorter's Adm'r, 18 Ala. 655; 1 Story's Equity Jur. §§ 164-5.

J. FALKNER, *contra*.

R. W. WALKER, J.—[July 11, 1861.]—The objection "to each sentence of each deposition" was nothing more than a general objection to each deposition; and as each deposition contained some legal evidence, the objections were properly overruled.—Milton v. Rowland, 11 Ala. 782; Donnell v. Jones, 18 Ala. 490.

[2.] It is well settled, that though a promissory note, or bill of exchange, be drawn payable to a person in a wrong name, the error will not affect his title, nor destroy his right to transfer the paper. And if a note be made to a person by a wrong name, the payee may sue upon it in his right name, alleging that the note was made payable to him by the name therein inserted, and he may show by evidence on the trial that he was the person intended. In like manner, where the suit is by an endorsee or transferee of a note purporting to be payable to Aaron *Formey*, and the complaint avers a promise to pay Aaron *Formby*, by the name of Aaron *Formey*, the plaintiff may show by evidence that Aaron Formby was the person really meant. Willis v. Barrett, 2 Starkie's R. 29; Moller v. Lambert, 2 Campb. 548; Leaphardt v. Sloan, 5 Blackf. 278; Medway Co. v. Adams, 10 Mass. 360; Sterry v. Robinson, 1 Day's R. 11; New York Af. Soc. v. Varick, 18 Johns. 38; Patterson v. Graves, 5 Blackf. 593; Jester v. Hopper, 8 Eng. 43; Leonard v. Nelson, 2 Cr. & M. 589; Byles on Bills, m. p. 60; Chitty on Bills, (Am. ed. 1864, by Perkins.)

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m. pp. 154, 561, 566, 625; Edwards on Bills, 251, 685; 1 Starkie's Ev. 472; Angell Corp. § 234. See, also, May v. Hewitt, 33 Ala. 166; Alabama Coal Co. v. Brainard, 35 Ala. 476. It follows, that there was no error in the several rulings of the court here complained of.

We will not now inquire whether the decision which was made in Gayle v. Hudson, (10 Ala. 116,) is consistent with the rule we have just laid down. Unless there is something in the nature of the instrument there sued on, the state of the pleadings, or the other facts disclosed, which distinguishes that case from this, and renders inapplicable the rule above declared, that decision cannot be sustained as a correct exposition of the law.

Judgment affirmed.

JONES vs. JONES' EXECUTOR.

[BILL IN EQUITY BY EXECUTOR, FOR CONSTRUCTION OF WILL, AND SETTLEMENT OF ESTATE.]

1. *Lapsed legacies; statutory provisions.*—Under section 1605 of the Code, a legacy or devise to a child or other descendant of the testator, who dies before the testator, leaving children or other descendants who survive the testator, does not lapse, and does not vest in the administrator of the deceased legatee or devisee, but passes directly to his children or other descendants, in the same proportions as if they took as his heirs-at-law or distributees; and his widow takes no interest in it.
2. *Emancipation act of 1860 not retroactive.*—The act of February 25, 1860, "to amend the law in relation to the emancipation of slaves," (Session Acts 1859-60, p. 28,) does not affect wills which had been admitted to probate before its passage.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE bill in this case was filed by the executor of the

last will and testament of Edward S. Jones, deceased, against the widow, devisees and legatees of said testator, and the widow, children, and personal representatives of Richard Jones, deceased; and sought a judicial construction of the testator's will, and a settlement of his estate. The testator died in Dallas county, where he resided, in December, 1858. By his will, which was executed in March, 1858, and admitted to probate in December, 1858, said testator devised and bequeathed the greater part of his estate, both real and personal, to his only son, Richard Jones; and made provision for the emancipation of several slaves, directing their removal to a non-slaveholding State, and the payment of a pecuniary legacy to each of them. Richard Jones died, intestate, a few weeks before the testator, leaving a widow and two infant children as his heirs-at law and distributees. The testator's widow dissented from his will; and her share of the estate was allotted to her in this suit, without objection from any of the other parties. The chancellor held, that the legacy and devise to Richard Jones, under section 1605 of the Code, did not lapse by his death before the testator, and did not pass directly to his children, but vested in his administrator, to be administered and distributed by him under the statute regulating the distribution of intestates' estates; and this part of the chancellor's decree is here assigned as error by the children.

E. W. PERRY, for the appellants.—Section 1605 of the Code was designed to promote equality in the distribution of estates. The evil to be remedied was, that where a testator directed his property to be divided equally between his two children, the law would carry the direction into effect, if both the children survived him; but, if one of the children died before the testator, the surviving child would take three-fourths of the whole estate, (that is, one-half under the will; and one-fourth under the statute of distribution,) while the descendants of the deceased child would take only the remaining fourth. But it was no part of the object of the statute to provide for the wi-

dow or creditors of the deceased legatee; for their existence, in the absence of children or other descendants, does not prevent the lapse of the legacy. The statute expressly declares, that the legacy "vests in such child," &c.; and the last clause was simply intended to show the proportion in which the several children should take. To make it vest in the administrator, would subject it to the claims of the widow and creditors, and would contravene the express words of the statute. For decisions upon similar statutes, see *Fisher v. Hill*, 7 Mass. 86; *Yeates v. Gill*, 9 B. Monroe, 208; *Newbold v. Pritchett*, 2 Wharton, 46; *Schreiffelin v. Keesler*, 5 Rawle, 115. The English statute, on which are based the cases cited by the chancellor, declares that the legacy "shall take effect as if" the legatee had died immediately after the testator.—2 Jarman on Wills, 533.

JNO. T. MORGAN, *contra*, cited *Johnson v. Johnson*, 3 Hare, 157; *In re Moore*, 10 Hare, 178; *Griffiths v. Gale*, 12 Sim. 354; 13 Jurist, 421; 18 Law Journal, 361.

A. J. WALKER, C. J.—[June 20, 1861].—We have attentively considered the learned and able opinion pronounced by the chancellor, but it has failed to convince us of the correctness of the conclusion attained by him. We regard section 1605 of the Code as forbidding the lapse of a devise or legacy, because the legatee or devisee, being a descendant of the testator, died before the testator, if such legatee or devisee left a descendant. We further regard it as substituting the descendants of the legatee or devisee, for such legatee or devisee, to the right of receiving the legacy or devise; and providing for an apportionment among such descendants, of the property bequeathed, in a manner conformable to the law which would have governed, if the devisee or legatee had survived the testator, and died intestate. That section of the Code is in the following words: "When any estate, real or personal, is devised or bequeathed to a child, or other descendants of the testator, and such legatee or de-

visée dies in the life-time of the testator, leaving a child or other descendant surviving such testator, such legacy does not lapse, *but vests in such child or other descendant*, as if such devisee or other legatee had survived the testator and died intestate." No importance can be attached to the want of the word "devise," in conjunction with the word "legacy," in that part of the section which declares that "such legacy does not lapse." The context supplies that word, and the section must be construed as if the reading of it were, "such legacy or devise does not lapse," &c. We, therefore, can make no distinction, in the operation of the statute, between devises and legacies.

If the statute had stopped with the announcement that the legacy or devise should not lapse, it would probably have followed, that the subject of the devise or legacy would have passed as by descent from the devisee, or gone into administration as part of the personal estate of the deceased legatee. If the statute, not stopping with the mere prohibition of the lapse, had then proceeded to declare that the devise or legacy *should take effect* as if the death of the legatee or devisee had happened immediately after the death of the testator, it would have been plain that the descendants of the devisee or legatee could only take as heirs or distributees under such devisee or legatee. With that feature, the statute would indicate a purpose to make the operation and effect of the bequest precisely what they would have been if the devisee had survived the testator. Prohibiting the lapse, and including that feature as to the effect of the devise, and omitting what follows after the prohibition of the lapse, our statute would have been, so far as it pertains to the question in hand, identical with the 32d section of the English statute of 1 Vic. ch. 26, under which it has even been held, that property bequeathed to a child, who died before the testator, would be transmitted by the will of the deceased child.—1 Jar. on Wills, (marg.) 311, 312; 2 *ib.* (m.) 726; Johnson v. Johnson, 3 Hare, 157. Our statute departs from the tenor of the English statute, where the clause prohibiting the lapse ends. It omits the emphatic decla-

ration of the English statute, as to the manner in which the devise or legacy shall take effect; but, in the place of it, says, that the legacy or devise shall vest in the descendants left by the legatee or devisee, as if such devisee or legatee had survived the testator and died intestate. This variance from the language and departure from the tenor of the English statute, forbid that we should take the construction of it as our guide. The legacy or devise, under our statute, must vest in the descendants of the devisee or legatee, and it must vest as if the devisee or legatee had survived the testator, and died intestate. The legacy or devise must vest in the persons named, and it must vest as if the specified contingency had occurred. Can we find an harmonious effect for both these requirements of the statute? We do not accomplish that object, if we make the descendants of the legatee or devisee take under such legatee or devisee as heirs or distributees. If the descendants so take the personal property, a legacy would not vest at all in the descendants of the legatee, but would vest in his administrator, for the purposes of the administration, and the descendants would only receive any residuum, which, upon the settlement of the administration, might be for distribution.—*Reese v. Harris*, 27 Ala. 301. The law would cast the title upon the administrator; and thus the legacy would, in fact, vest in the administrator, in contravention of the express command of the statute that it should vest in the descendants of the legatee; and if the estate should be insolvent, the descendant would be denied even a remote benefit from property which the law declares shall be vested in him. It is apparent that such a view of the law would impair the force of one of its features, and in some cases utterly destroy the effect of that feature. On the other hand, we think the words, "as if such devisee or legatee had survived the testator, and died intestate," have an office assigned them perfectly consistent with their import, if we understand them as laying down a rule for dividing the property among the descendants. It vests in them as if the devisee or legatee had died, intestate, after the testa-

tor; that is, it vests in them in such shares or proportions as if the property had come to them as heirs and distributees of the legatee or devisee. This construction of the statute, doing violence to none of its words, allows an harmonious operation to all its parts. For these reasons, we adopt it, and decide, that the children of Richard Jones must, as devisees or legatees of the testator, take the property, real and personal, bequeathed to said Richard, to the exclusion of Richard's widow and administrator. Our conclusion in this case is also sustained by the Pennsylvania and Kentucky decisions in reference to a somewhat similar statute, collected on the brief of the appellant's counsel. *Descendant*, in the statute which we have been construing, can not be understood to include the widow of the legatee or devisee. The natural signification of the word is not broad enough to embrace the widow, and there is nothing in the context to force upon the word a meaning differing from its natural import.

[2.] The act of 25th February, 1860, entitled, "an act to amend the law in relation to the emancipation of slaves," does not affect the bequest in the will of Edward S. Jones, in relation to the emancipation of slaves.—Acts 1859–60, p. 28. That will became effectual, at least, upon its admission to probate; and as it was admitted to probate before the passage of the act above named, it is expressly saved from the operation of that act by the 5th section.—*Hall's Heirs v. Hall's Executors*, at this term.

We do not notice in this opinion any other question raised by the assignments of error, because no other question has been presented by the counsel, either in oral argument, or in the briefs:

Reversed and remanded.

McGEHEE vs. RUMP.

[ACTION FOR BREACH OF WARRANTY OF SOUNDNESS OF SLAVE.]

1. *Admissibility of parol evidence to affect bill of sale.*—If the parties to a contract, for the sale or exchange of two slaves, reciprocally execute to each other bills of sale, which show on their face that the transaction was a sale; and an action is afterwards brought on one of these bills of sale, to recover damages for a breach of the warranty of soundness contained therein,—parol evidence is admissible, to show that the contract was in fact an exchange, and not a sale.
2. *Difference between sale and exchange; validity of sale of slave by unlicensed negro-trader.*—A contract for the exchange of two slaves, of unequal values, is not converted into a sale, by the payment of a sum of money for the difference of value, and the insertion of a money value as the consideration in the bill of sale; and on the other hand, if the transaction was really a sale of one of the slaves, which was void by statute, (Code, §§ 399, 400,) because the vendor was an unlicensed negro-trader, the acceptance of another slave, in part payment of the price, could neither change the nature of the contract, nor render it valid.

APPEAL from the Circuit Court of Macon.

Tried before the Hon. NAT. COOK.

THIS action was brought by Allen C. McGehee, against James Rump, to recover damages for a breach of warranty of the soundness of a slave named Myra, alleged to have been sold by defendant to plaintiff on the 29th January, 1854. No pleas appear in the record. On the trial, as the bill of exceptions shows, the plaintiff read in evidence, after proving its execution, the bill of sale executed to him by the defendant, (which is copied in the opinion of the court,) and then adduced evidence tending to show the unsoundness of the slave at the time of the sale. The defendant then read in evidence, after proof of its execution, a bill of sale executed to him by the plaintiff for a slave named Viney, (which is also copied in the opinion of the court,) and proved by one Foster,

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who was a subscribing witness to both bills of sale, "that they were both signed and delivered on the same day, and at the same time; that he (witness) understood from both parties, at the time, that they had swapped negro girls, and that the defendant gave the plaintiff some \$200 difference between the girls." "It was admitted, that the plaintiff, at the time of said trade, was a negro-trader, residing in Columbus, Georgia, and had not taken out a license to sell said girl Viney. This was all the evidence upon the matter, as to whether said trade was a sale or an exchange of slaves. The court thereupon charged the jury, that if said bills of sale were executed at the same time, and were in fact parts of the same transaction, and constituted the transaction, then the contract between the parties was a sale, and not an exchange of slaves; and that the plaintiff could not, by parol evidence, explain or contradict the bills of sale, so as to show that the transaction evidenced by them was an exchange." To this charge the plaintiff excepted, and he now assigns the same as error.

CLOFTON & LIGON, for appellant, contended—1st, that the transaction between the parties, as evidenced by the bills of sale alone, was an exchange, and not a sale of slaves; and, 2d, that if the bills of sale showed the contract to be a sale, parol evidence was admissible, to show that it was in fact an exchange; citing the following authorities: Strong v. Gregory, 19 Ala. 146; Hamner v. Smith, 22 Ala. 438; Saunders v. Saunders, 20 Ala. 710; Pollard v. Maddox, 28 Ala. 321; Eckles & Brown v. Carter, 26 Ala. 563.

GOLDTHWAITE, RICE & SIMPLE, *contra*, cited Gunter v. Leckey, 30 Ala. 591; Ridgway v. Bowman, 7 Cushing, 268; Small v. Quincey, 4 Greenl. 497; Bradford v. Bush, 15 Ala. 322; West v. Kelly, 19 Ala. 358; Bishop v. Hampton, 19 Ala. 792; Bayard v. Malcolm, 1 Johns. 467; Brigham v. Rogers, 17 Mass. 571; Brooks v. Maltbie, 4 Stew. & P. 96; Paysant v. Ware, 1 Ala. 160; Hair v. LaBrousse, 10 Ala. 548; Spann v. Cole, 13 Ala. 587.

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STONE, J.—[July 9, 1861.]—This record presents but a single question. The plaintiff was a negro-trader, living in the State of Georgia. He instituted suit to recover of defendant damages for a breach of warranty of soundness of a slave named Myra. The defendant's bill of sale is as follows: "Received from Allen C. McGehee six hundred dollars, for negro girl Myra, twelve years old. The right and title of the said girl I do warrant and defend against the claims of all persons whosoever, and warrant sound and healthy, both in body and mind; as witness," &c. Contemporaneously with the execution of this bill of sale by defendant, the plaintiff executed to him a bill of sale, as follows: "Received from James Rump a negro girl by the name of Myra, in part payment, and two hundred dollars in money, full payment for a negro girl Viney, thirteen years old. The right and title of the said slave we do warrant and defend against the claims of all persons whosoever, and warrant sound and healthy, both in body and mind; as witness," &c. Both bills of sale were under seal. The trade was made in Macon county, Alabama; and the plaintiff had obtained no license to sell, or to offer said slave for sale. The defense relied on in the court below was, that the bill of sale on which the action was founded was executed in the purchase of the slave Viney; and that the sale by plaintiff was void as to him, the seller, under section 400 of the Code.—See *Gunter v. Leckey*, 30 Ala. 591. In avoidance of this defense, the plaintiff offered parol proof, tending to show that the real transaction between the parties was an exchange of slaves, and not a sale. The ruling of the circuit court excluded this evidence from the jury, and this presents the sole question for our consideration.

There are few questions of evidence on which more has been said, than that which seeks to vary by parol the terms of a written contract; and we may add, there are few legal questions on which there is a greater conflict of the authorities. As early as 1823, Ch. J. Tilghman characterized the adjudications on this question as a "wilderness of cases;" nor has modern jurisprudence

blazed a clear path through that wilderness. We will not attempt the task ourselves, further than may be rendered necessary by the wants of this case.

There is no repugnancy of decision on the general proposition, that parol proof shall not be heard, in a court of law, to vary, enlarge, or diminish the binding obligations of a written contract, as between the parties. In suits on such written contracts, if there be no question of fraud in the execution of the instrument, the parties must stand or fall by the evidence they have furnished of their own contract; and what the terms of that contract are, is a question of law for the court, and not a question of fact for the jury. But, when the question presented is not among the controlling or primary purposes of the writing, but concerns an incident, rather than the direct object and aim of the contract, less stringency of rule has generally been enforced. Here commences the conflict of authorities, which, for the welfare and repose of society, it were well to have reconciled. We think we are in safe bounds, when we assert that, in the advancing history of both England and the most of the States of America, we discover a disposition in the courts rather to relax the rule, than to make it more stringent.

The decided weight of the modern authorities, as our after citations will show, is, that the consideration clause of a deed is open to the influence of parol proof, except for two purposes: first, it is not permissible for a party to the deed to prove a different consideration, if such change vary the legal effect of the instrument; and second, the grantor in a deed, who acknowledges the receipt of payment of the consideration, will not be allowed, by disproving that fact, to establish a resulting trust in himself.—*Eckles v. Carter*, 26 Ala. 563; *Belden v. Seymour*, 8 Cow. 304; 4 Phil. Ev. (C. & H. Notes,) edition of 1850, 585.

The phrase, *to vary the legal effect of the instrument*, is certainly not very precise or definite. Deeds usually have a direct effect, which is seen and comprehended as soon as you look upon the instrument; and they fre-

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quently have also an indirect or incidental effect, which is brought to view by proof of some outside or extrinsic fact. Does the principle include both, or only the first named of these classes of cases? On principle it would seem obvious, that parties to a deed would have in contemplation the effect of the instrument as a transfer, or muniment of title; and hence, to allow parol proof to vary or add to its provisions or stipulations any term, condition, or fact, which would change either the quality of the title conveyed, or the binding covenants of the grantor, would let in all the mischiefs which the rule under discussion was intended to guard against.—See *Murphy v. Br. Bank*, 16 Ala. 90.

But both principle and authority, as we conceive, proclaim a different rule, when the proof offered does not tend to change the covenants, or to vary the title conveyed by the deed, but simply to repel an inference to be drawn from some extrinsic fact. Such fact is brought to the notice of the court by extrinsic proof, in the absence of which, the deed would be amply operative as a contract of bargain and sale. The parties, in drawing their contracts, are not presumed to have had in view these extrinsic facts; and hence should not be concluded by apparent facts, which, in the absence of the extrinsic fact, have the same legal significance as those which the party seeks to prove.

In speaking of the effect of recitals in deeds, Mr. Greenleaf, after enumerating several classes of these recitals, among which is, "the number of tons in a vessel chartered by the ton," adds—"these are but incidental and collateral to the principal thing, and may be supposed not to have received the deliberate attention of the parties." These, he declares, are not within the rule which excludes parol proof.—1 Greenl. Ev. § 26.

In the notes of Cowen & Hill to Phillips on Evidence, the principle is thus stated: "The American cases regard the ordinary clause of a deed of conveyance, acknowledging the receipt of the consideration money, as essential, in connection with its other terms, to express

the intention in regard to the estate or interest granted or transferred; and hence, so far, and as between the parties or their privies, it is not open to impeachment, save in equity. But, when the intention in this respect is not disputed, nor the operation of the conveyance, as such, sought to be changed, the clause in question is treated as formal merely, like the date, and may be contradicted or varied by parol."—Vol. 4, ed. of 1850, 583. In another place, the same annotators said, "The English decisions, therefore, whatever may be said of their *dicta*, do not appear to have gone beyond the point of disallowing proof to show a consideration of a different species, so as thereby to change the nature of the deed." And they instance the case of a deed, which on its face purported to be a sale for value, and which could not operate as such. In such case, the English rule would forbid that the deed should be set up as a voluntary conveyance.—Vol. 4, p. 619; see, also, *ib.* 584-5.

In *McCrea v. Purmort*, (16 Wend. 473,) the court of errors of New York, Judge Cowen delivering the opinion, said: "A party is estopped by his deed. He is not to be permitted to contradict it; so far as the deed is intended to pass a right, or to be the exclusive evidence of a contract, it concludes the parties to it. But the principle goes no further." In that case, it was held, that although the deeds to the lauds expressed *money paid* as the consideration, it was competent to show that the real consideration was iron of a specified quantity, valued at a stipulated price. The case last cited contains an elaborate discussion of both the principle and the adjudged cases.

In the case of *Gully v. Grubbs*, (1 J. J. Marshall, 387,) the supreme court of Kentucky, speaking of this question, said: "Receipts, and other writings which only acknowledge the existence of a simple fact, such as the payment of money for example, may be susceptible of explanation, and liable to contradiction by witnesses." In the same case it was said, that "whenever a right is vested, or created, or extinguished, by contract or otherwise, and writing is employed for that purpose, parol tes-

timony is inadmissible to alter or contradict the legal or common-sense construction of the instrument."—See, also, *Jack v. Dougherty*, 3 Watts, 151; *Gale v. Williamson*, 8 Mees. & Welsby, 405; *Mildmay's case*, 1 Rep. 176; *Belden v. Seymour*, 8 Conn. 304; *Harvey v. Alexander*, 1 Rand. 219; *Bullard v. Briggs*, 7 Pick. 533; *Pott v. Todhunter*, 2 Coll. Ch. 76; *Steele v. Worthington*, 1 & 2 Ohio Rep. 350; *Bedell's case*, 7 Rep. 39; *Rex v. Scammonden*, 1 T. R. 474; *Rockhill v. Spraggs*, 9 Ind. 30; *Meeker v. Meeker*, 16 Conn. 387; *Pritchard v. Brown*, 4 N. H. 397; *Morse v. Shattuck*, *ib.* 229; *Rex v. Lainden*, 8 T. R. 376; 2 Poth. Ob. 181; *Wilkinson v. Scott*, 17 Mass. 257; 2 Hill's Pr. 292; *Stallworth v. Preslar*, 34 Ala. 511; *Tyler v. Carleton*, 7 Greenl. 175; *Burbank v. Gould*, 15 Maine, 118; *Wallis v. Wallis*, 4 Mass. 135; *Gale v. Colmer*, 18 Pick. 397; *Hayden v. Mentzer*, 10 Serg. & R. 329.

We have cited and collated this immense array of authorities, mainly for the purpose of showing the spirit of the rule under discussion. Perhaps such elaboration was not necessary in this case. In the case of *Eckles v. Carter*, (26 Ala. 564,) this court passed on the precise question we are considering, except that the object of the proof in that case was not to repel an illegality, brought to view by extrinsic evidence, but to let in a defense which was otherwise illegal. Much of the reasoning, however, employed in that case, is equally applicable to this; and we think the true rule is there stated—namely: "Where the deed is not impeached (for fraud), we are unable to perceive any reason why any consideration, which is sufficient to support the deed, may not be shown. In such a case, we see no middle ground to occupy, and must either hold that the clause is conclusive, operating by way of estoppel, or must throw it entirely open to explanation." And this court, in that case, fully adopted the doctrine of *McOrea v. Purmort*, and threw open the consideration clause to explanation, in cases where the deed was not attacked for fraud.

Some of the cases cited above, particularly those from

Maine, Connecticut and New Hampshire, carry the doctrine farther than we need go, and farther than we are inclined now to commit ourselves. We cite them, however, with others, as showing, conclusively, that the doctrine contended for by appellee is opposed to the weight of authority. That there are authorities opposed to this view, we will not deny. In some of them, the conflict is more apparent than real. Many of them state the principle loosely, while most of them, on a close criticism, may be reconciled with the principle we have announced. We cite them that the profession may examine what has apparently been said on the other side of this question. *Whitlock v. Whitlock*, 9 Cow. 270; *Garrett v. Stuart*, 1 McC. 514; *Betts v. Union Bank*, 1 H. & Gill, 186; *Watt v. Grove*, 2 Sch. & Lef. 500; *Bridgman v. Green*, 2 Vesey, sr. 627; *Hinde v. Longworth*, 11 Wheaton, 212; *Jackson v. Delancey*, 4 Cow. 427. Most of these cases were marked by strong badges of fraud, and are therefore within Judge Goldthwaite's exception, as laid down in *Eckles v. Carter*.

The following authorities relate to a different principle, and are not in point: *Ridgway v. Bowman*, 4 Cushing, (Mass.) 271; *Small v. Quincey*, 4 Greenl. 497; *Coal & Banking Co. v. Ryerson*, 3 Dutch. 466-7. See, also, 1 Md. Ch. Dec. 394; 2 Tay. Ev. § 818.

Where a deed to lands has been executed, reciting that the consideration money has been paid, the plain effect of such deed, unexplained by outside proof, is to vest an absolute and indefeasible title in the purchaser. Yet, on bill filed to assert the vendor's lien, parol testimony is admissible, to show that the purchase-money has not been paid, and thus contradict the recital. This principle is so well settled, that no one now questions it.—See *Saunders v. Hendrix*, 5 Ala. 224; 3 Phil. Ev., C. & H. Notes, (ed. of 1850,) 384. The incidental effect of this proof is, to convert an absolute title into an interest closely akin to that of a mortgagor's equity of redemption. Directly, it does not affect the right and title conveyed by the instrument; but indirectly it defeats it.

So, in this case, the proof made by Mr. Rump—namely, that Mr. McGehee was a negro-trader, without license to sell—did not directly impair or affect the title which Mr. McGehee had conveyed to him, or the covenants contained in that title. The influence it exerted was but an incident. The fact proposed to be proved by the plaintiff was also incidental in its character, and should have been admitted.

[2.] If the spirit and substance of the transaction, *without which no trade would have been made*, was an exchange of slaves, and the money was employed as the means of equalizing the supposed values, then the fact that a money value was inserted in the bills of sale can not convert it into a sale. The practice of inserting a money value in title deeds, when an exchange only is intended, is convenient, and is believed to be very common. It cannot convert a real exchange into a sale.—See *Gunter v. Leckey*, 30 Ala. 596; *Addis on Contr.* 154; 1 *Parsons Contr.* 437, note; *Anon.*, 3 *Salk.* 157; *Mitchell v. Gile*, 12 N. H. 395; *Vail v. Strong*, 10 *Verm.* 457. If, on the other hand, the real transaction was a sale, although another piece of property was taken in part payment, then any attempt to screen it from public scrutiny by a pretended exchange would be abortive. Whether this was a sale or an exchange, it is not for us to determine, and we intimate no opinion upon it.

Reversed and remanded.

MITCHELL vs. TURNER ET AL.

[ACTION ON SHERIFF'S OFFICIAL BOND.]

1. *Action at law between co-sureties on official bond.*—One of the sureties on a sheriff's official bond cannot maintain an action at law on the bond, against the other sureties, for their principal's default.

2. *What is good plea in bar.*—That the plaintiff is one of the obligors on the bond which is the foundation of the suit, is properly pleaded in bar, and not in abatement.

APPEAL from the Circuit Court of Tallapoosa.

Tried before the Hon. ROBERT DOUGHERTY.

THIS action was brought by William M. A. Mitchell, against Green L. Turner, Simon B. Smith, James T. Shackelford, William Paige, and Wyatt H. Whatley, as the sureties on the official bond of Hugh Lockett, deceased, late sheriff of said county. The complaint averred the execution of the bond, set out the condition, and alleged, as a breach thereof, the collection of money by two of the sheriff's deputies, under process on a judgment in favor of the plaintiff, and their failure to pay it over to him on demand. The defendants cravedoyer of the bond and condition, (which were thereupon set out,) and pleaded in bar, that the plaintiff was one of the joint makers and obligors of said bond, and equally liable with them for any breach of the same, and was the identical W. M. A. Mitchell whose name was signed to said bond. The plaintiff demurred to this plea, "because the same is no answer to the complaint, and because it does not present a valid defense to the action, and because it is insufficient in law." The court overruled the demurrer, and the plaintiff was thereby compelled to take a nonsuit, with a bill of exceptions; and he now assigns as error the ruling of the court on the demurrer.

J. FALKNER, for appellant.—1. Under the provisions of the Code, joint bonds, covenants, and promises in writing, are declared several, as well as joint; and the plaintiff may, at his election, sue one, several, or all.—Code, §§ 2143, 2149, 2154, 118, 130, 131. The sureties on official bonds have no right of action against each other, until they have actually paid off the liability; and if they could not support a suit until payment, they could not set up the right by way of plea.—Code, § 143.

2. If the matter of the plea was available at all, it could

only be by plea in abatement.—*Boswell v. Morton*, 20 Ala. 235; *Henderson v. Hammond*, 19 Ala. 340.

BROCK & BARNES, *contra*, cited *Chandler v. Shehan*, 7 Ala. 251; *Tindall v. Bright, Minor*, 103; *Ramsey v. Johnson, Minor*, 418; *Mainwaring v. Newman*, 2 Bos. & P. 120.

R. W. WALKER, J.—[July 11, 1861.]—The English rule is, that a person cannot be a plaintiff in an action against others, on a contract made by those others jointly with him.—*Mainwaring v. Newman*, 2 Bos. & Pull. 120; *Moffatt v. VonMullingen*, 2 Chitty's Rep. 539; 8 Rob. Pr. 301. Without at this time committing ourselves to this rule, in the broad terms in which it is here stated, we are satisfied that one of the sureties on a sheriff's bond cannot maintain an action at law on such bond against his co-sureties. The plaintiff, being co-surety with the defendants, and bound equally with them to make good the sheriff's default, cannot recover the whole amount of them. The loss must be apportioned among the sureties, and this a court of law is incompetent to do.—See *Tindall v. Bright, Minor*, 103; *Chandler v. Shehan*, 7 Ala. 251; *Carroll v. Bowie*, 7 Gill, 34, (41-3;) *Milburn v. Codd*, 7 B. & Cr. 419.

[2.] There is nothing in the objection, that the plea was a plea in abatement, and should have been sworn to. A plea in abatement ought to give a better writ; but the matter alleged in this plea shows that the plaintiff can have no action at all, and was therefore properly pleaded in bar.—*Mainwaring v. Newman*, 2 Bos. & Pull. 121; *Moffatt v. Von Mullingen*, 2 Chitty, 539.

Judgment affirmed.

McLEMORE vs. NUCKOLLS.

[DETINUE FOR SLAVES, AGAINST SHERIFF.]

1. *Decree in chancery construed as authorizing issue of fi. fa.*—A decree in chancery, rendered on pleadings and proof, under a bill filed by the secured creditors, against the trustees in a deed of trust, charging them with waste, negligence, and misapplication of the assets; adjudging that the complainants are entitled to relief, and ordering the master to state an account of the several debts due to the complainants respectively, and the several amounts with which each trustee is chargeable, and to ascertain the *pro-rata* dividend of each creditor; and a subsequent decree, confirming the master's report,—though informal, are, when construed together and in connection with the bill and the master's report, equivalent to an order for the payment of the several sums of money ascertained to be due from each of the trustees to each of the creditors, and sufficient to authorize the issue of a *fi. fa.*
2. *Admissions of cestui que trust admissible against trustee.*—In an action brought by the trustee of a married woman, suing for her use, her admissions are competent evidence against him.
3. *Admissibility of bill in chancery as evidence in another suit.*—A bill in chancery, sworn to by the complainant, is competent evidence against him in another suit; and the fact that the complainant is a *feme covert*, suing by her next friend, does not vary the principle.
4. *Competency of distributee as witness for estate.*—On the death of a married woman, pending an action brought by her trustee for her use, a distributee of her estate is not a competent witness for the plaintiff.
5. *Admissibility of record as evidence.*—In detinue by the wife's trustee suing for her use, to recover slaves which he had bought at a sale under mortgage executed by the husband, and which were afterwards seized and sold by the defendant, as sheriff, under execution against the husband; the defendant having introduced evidence tending to show, that the money, with which the plaintiff paid for the slaves, was furnished by the wife, and was in fact, as to the creditors of the husband, his property,—the record of a chancery suit, instituted by the plaintiff individually after his purchase of the slaves at the mortgage sale, for the purpose of foreclosing a mortgage on other slaves executed by the husband; to which suit the defendant was not a party, and in which the plaintiff was charged with certain moneys paid him by the wife, is not competent evi-

dence for the plaintiff, "to show that creditors of the husband had already received the money paid by the wife to the plaintiff:" as to the defendant, it is *res inter alios acta*.

6. *Fraudulent conveyances; who are creditors or debtors.*—A trustee, under a deed of trust for the benefit of creditors, becomes their debtor from the time he receives money which, by the terms of the deed, ought to be paid over to them, without any subsequent violation of duty on his part, or demand made by them; and the fact that the creditors are non-residents, does not affect the principle.
7. *Abstract charge.*—A charge to the jury cannot be considered abstract, when the bill of exceptions recites evidence tending to show the existence of the facts on which it is predicated; and if the record fails to show such evidence, the appellate court will presume that a charge given was not abstract, when the bill of exceptions does not purport to set out all the evidence.
8. *Validity of voluntary conveyance.*—A contract between husband and wife, by which a separate estate is created in the wife in the future earnings of herself and her domestic servants, is void as to the existing creditors of the husband; and slaves purchased for her by a third person, and paid for with her earnings under such contract, are subject to the existing debts of the husband, like any other property purchased for her with the husband's money.
9. *Presumption in favor of judgment.*—When a charge is requested, which, on the facts hypothetically stated, asserts a correct legal proposition; but those facts might be met and avoided by proof of other facts, which would render the charge erroneous,—if the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, in favor of the ruling of the primary court, that such additional facts were proved.
10. *Conclusiveness of admission under oath.*—When a bill in chancery, under oath, is offered in evidence against the complainant in a subsequent suit, he is not thereby estopped from denying its averments.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. S. D. HALE.

THIS action was brought by Moses McLemore, as trustee for Mrs. Matilda S. Pinkston, the wife of James K. Pinkston, and suing for her use, against George B. Nuckolls, to recover a negro woman, named Easter, together with damages for her detention; and was commenced on the 10th January, 1854. The defendant pleaded *non detinet*, and issue was joined on that plea. It appeared on

the trial, from the evidence adduced by the plaintiff, that the slave originally belonged to said James K. Pinkston, who, on the 2d December, 1844, mortgaged her, with two other slaves, to the Branch Bank at Montgomery, to secure a *bona-fide* debt which he owed to said bank. The mortgage contained a power of sale, under which the slaves were sold on the 5th February, 1849, and were bid off at the sale by the plaintiff, at the price of \$1325. The assistant bank-commissioner, by whom the sale was made, executed a bill of sale for the slaves to the plaintiff; and the latter gave his bill of exchange, accepted by Ann Harper, dated the 5th February, 1850, (?) and payable on the 1st January next after date, for the price; which bill, not being paid at maturity, was renewed by another bill on Ann Harper, and the latter bill was afterwards paid by plaintiff. On the 9th February, 1849, the plaintiff executed a bill of sale for said slaves, at the specified price of \$1422 17, to William J. McLemore, who, on the same day, and at the same specified price, reconveyed them to the plaintiff, "in trust for the sole and separate use of Mrs. Matilda S. Pinkston, and to be disposed of as she may direct, by will or otherwise, at her death, amongst her children then living."

In the latter part of December, 1853, or about the 1st January, 1854, the defendant, as sheriff of Macon county, levied an execution on the slave now in controversy, as the property of James K. Pinkston; and sold said slave, under said levy, on the 1st Monday in February, 1854. This execution was issued on a decree in a chancery cause, in which Brewster, Solomon & Co. and others were plaintiffs, and said Pinkston and one Whitesides were defendants. The bill in that case was filed by the complainants, on behalf of themselves and certain other creditors of C. D. McCall & Co., who were secured by a deed of trust executed by said McCall & Co. to said Pinkston and Whitesides as trustees; charged said trustees with waste, negligence, and misapplication of the assets which had come to their hands, and sought an account and settlement of the trust. The deed of trust was dated and exe-

cuted on the 3d February, 1838; and conveyed to said trustees a large stock of goods, with the outstanding notes and accounts, and all the other personal assets belonging to said McCall & Co. as partners, in trust to sell, on such terms as the said trustees might deem expedient, and, after paying the expenses incurred in the execution of the deed, to apply the residue of the proceeds, first, to the payment of the debts due from said McCall & Co. to certain creditors residing in New York, and the balance to certain other specified creditors. The trustees accepted the trust, entered on the execution of the duties thereby imposed upon them, and sold the goods, &c., conveyed to them. At the July term, 1847, on hearing on pleadings and proof, the chancellor held, that the complainants were entitled to relief, and ordered an account to be taken by the master, to ascertain the amount of the trust funds which had come to the hands of each of the defendants, the amount due to each one of the complainants from McCall & Co., and their *pro-rata* dividend of the funds with which the defendants were chargeable; "reserving the question of costs, and all other questions, for further directions on the coming in of the report." The master reported, at the July term, 1849, that there was of the trust funds the sum of \$4,830 27 in the hands of Pinkston, and \$4,906 33 in the hands of Whitesides; and also ascertained the *pro-rata* dividend to which each creditor was entitled of these amounts. At the same term, the chancellor confirmed the master's report, and adjudged the costs of suit against the defendants. The execution which, as above stated, the defendant levied on the slave in controversy, was against Pinkston alone, and commanded the sheriff to make the sum of \$4,830 27, which Brewster, Solomon & Co. and other creditors, specified by name, "recovered of him on the 5th July, 1847, by a decree of the chancery court," &c.

On the trial, as appears from the bill of exceptions, after the plaintiff had proved his own title, as above stated, the seizure of the slave by the defendant; her value, and the value of her hire, the defendant offered in evidence the

deed of trust from McCall & Co. to Pinkston and Whitesides; proved the said trustees' acceptance of the trust, their sale of the goods, &c.; and then offered in evidence the record of the said chancery suit, the execution, sheriff's endorsement thereon, &c. "The plaintiff objected to the introduction of the proceedings in said chancery suit, on the ground that there was no decree in said cause; and to said execution, on the ground that there was not such a decree as would sustain it, and that said execution was void." The court overruled these objections, and admitted the evidence; to which the plaintiff excepted.

The defendant then offered in evidence a transcript, duly certified, of a bill in chancery filed by Mrs. Pinkston, suing by her next friend, against her husband, James K. Pinkston, Moses McLemore, and Rebecca Smith; accompanied by proof that the slave Easter, or Esther, therein mentioned, was the slave here in controversy. This bill was filed on the 8th January, 1852, and was sworn to by Mrs. Pinkston. It sought to enjoin said McLemore and Rebecca Smith from further proceedings at law, to subject certain slaves and other personal property, in which the complainant claimed a separate estate, to the satisfaction of their several judgments against said James K. Pinkston. It alleged, in substance, that said Pinkston, in 1839 or 1840, placed four domestic servants under the sole control of the complainant, under an agreement that, after defraying all the family expenses, the balance of the proceeds of their labor and her own might be retained by her for her sole and separate use and benefit; that under this contract, by the exercise of industry and economy, she was enabled to realize a sum which, after paying all the current family expenses, and assisting her husband in the payment of his debts and the education of their children, amounted, in 1850, to over \$2,000; that in February, 1849, said McLemore purchased for her, at a mortgage sale, the slave Easter and two others, at the price of \$1825, which amount she paid to him out of the funds belonging to her separate estate under the said contract between herself and her husband.

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See the case reported in 31 Ala. 308. The plaintiff objected to the admissions of this transcript, on the following grounds: "1st, because it was only the admission of a *feme covert*, and was therefore incompetent; 2d, because Pinkston's title was only equitable, and was not the subject of litigation, and, consequently, was not an issue before the jury; and, 3d, because Mrs. Pinkston was not a party to the suit, and her admissions were not evidence." The court overruled all these objections, and admitted the transcript; and the plaintiff excepted.

It was admitted, that Mrs. Pinkston died, in July, 1857, in Mississippi, where she and her husband then resided. The plaintiff offered said James K. Pinkston, her husband, as a witness. The defendant objected to his competency, on the ground that, by the laws of Mississippi, he was one of the distributees of her estate; and read in evidence the statutes of Mississippi, regulating the distribution of intestates' estates; and it was agreed, that these statutes might be read in this court, on appeal, from the Mississippi Code, as if they had been incorporated in the bill of exceptions. The court sustained the objection to the competency of the witness, and excluded him; to which the plaintiff excepted.

It was admitted, that the plaintiff had collected about \$2,000, by suit, from Mrs. Ann Harper, as the acceptor of the bill of exchange given, as above stated, for the three slaves bought by him at the mortgage sale. "To prove that the creditors of James K. Pinkston had already received from the plaintiff the money paid to him by Mrs. Pinkston," the plaintiff offered in evidence the record of a chancery suit, instituted by himself, individually, against said James K. Pinkston and others. The bill in that case was filed for the purpose of foreclosing a mortgage on several slaves, which was executed by said James K. Pinkston, on the 19th May, 1845, and the law-day of which was the 1st January, 1846. The mortgage was given to Graham & Rogers, to secure the payment of a promissory note for \$1,000; and was assigned by them, on the 20th March, 1847, for valuable consideration, to

Solomon Thompson, whose administrator assigned the same, on the 12th February, 1849, for valuable consideration, to said McLemore. In May, 1849, the slaves were sold under executions against said Pinkston; and the several purchasers at the sale were made defendants to the bill. A decree *pro confesso* was entered against Pinkston. The other defendants answered; alleging that the money, with which McLemore purchased the mortgage, was furnished to him by Pinkston, through his wife, and that the transaction was intended to place the slaves beyond the reach of Pinkston's creditors. On the final hearing, on pleadings and proof, the chancellor held, that the mortgagor was entitled to a credit for the money advanced by Mrs. Pinkston to McLemore, but ordered a foreclosure as to the balance of the purchase-money paid by McLemore; and his decree was affirmed by this court, on appeal, at its June term, 1857.—See the case reported in 31 Ala. 266. On motion of the defendant, the court excluded the record, and the plaintiff excepted.

The court charged the jury, "that from the time Pinkston received any money under the assignment from McCall & Co., which was to be applied to the payment of the debts specified in the schedule, he became the debtor of those creditors, and the fact that they resided in New York made no difference; and that if he thus became indebted to them, and the slave sued for was transferred or conveyed by him to his wife, under the agreement set forth in the bill in chancery filed by her against him and others, or was bought by McLemore, for her separate use, with the earnings derived by her from the property which she received from said Pinkston under said agreement, and said agreement was made after said Pinkston became so indebted, then the said slave would be liable to the payment of a judgment or decree obtained by any such creditors against said Pinkston, founded on said indebtedness." The plaintiff excepted to this charge, and requested the court to instruct the jury, "that if the creditors under the assignment resided in New York, Pinkston, the trustee, who resided in Montgomery, where the

assignment was made and the business transacted, was not in default for not paying them, until they demanded payment of him, and was not their debtor, in the sense the law requires, until he failed to pay on demand." The court refused to give this charge, and the plaintiff excepted to its refusal.

The plaintiff also requested the following charges in writing:

"1. If the jury believe, from the testimony, that the slave sued for belonged to James K. Pinkston in December, 1844; that said Pinkston, on the 2d December, 1844, executed in good faith the mortgage which had been read in evidence, to secure the payment of the debts therein described; that such debts were due and owing by him, in good faith, to the Branch Bank at Montgomery; that afterwards, said debts being unpaid, said slave was sold by the assistant bank-commissioner, under said mortgage, to pay said debts, and was purchased at said sale by said McLemore; that said McLemore, on the 9th February, 1849, executed to William J. McLemore the bill of sale which had been read in evidence; that said William J. McLemore, on the 9th February, 1849, executed to said plaintiff the other bill of sale, or deed for said slave, which had also been read in evidence; that said plaintiff, for the purchase-money of said slave, gave said bank his bill of exchange, accepted by Ann Harper, and afterwards paid said bill with his own money, and not with the money of James K. Pinkston; and that he has not been repaid by said James K. Pinkston, or with money of said Pinkston, but by Mrs. Ann Harper,—then the plaintiff is entitled to a verdict, if the defendant was in the possession of said slave at the commencement of this suit.

"2. If the plaintiff purchased said slave, at a sale made by the Branch Bank at Montgomery, under the mortgage executed by James K. Pinkston to secure debts due to said bank in good faith, and paid the purchase-money from his own funds, and did not use the money of James K. Pinkston for that purpose, and was not repaid by said Pinkston, nor with said Pinkston's money, but with the

money or funds of Mrs. Harper,—then the plaintiff is entitled to a verdict, if the jury further believe that the deed of the bank to plaintiff, of February 5th, 1849, was then executed to him, and that the bill of sale from him to William J. McLemore, and the deed from said William J. McLemore to him, both dated February 9, 1849, were severally executed at that time, and that the defendant had the possession of said slave at the commencement of the suit.

“3. If plaintiff purchased said slave, at a sale made by the Branch Bank at Montgomery, under the mortgage executed by Pinkston, which was read in evidence, and which was honestly made to secure debts due from him to said bank in good faith, and paid the purchase-money with his own funds, and not with the money of Pinkston, (although he may have purchased said slave for the sole and separate use of Mrs. Pinkston, and at her request; and although Mrs. Pinkston may have placed in his hands, to buy said slave, money which belonged to her said husband, but which he used in some other way for her;) and if he has not been repaid the money which he thus paid for said slave, by said Pinkston, or with money or funds belonging to said Pinkston; and if the several instruments read in evidence—the deed from the bank to McLemore, the deed from him to William J. McLemore, and the deed from William J. McLemore back to him—were executed as they purport to be; and if the defendant was in possession of said slave when this suit was commenced,—then the plaintiff is entitled to a verdict.

“4. If Mrs. Pinkston placed money in the plaintiff's hands, for the purpose of buying said slave for her, for her sole and separate use, which money was, in law, the money of her said husband; and plaintiff, instead of using said money in the payment for said slave, in fact paid for her with his own money, and not with the money or funds of Pinkston; and he has never been repaid, either by Pinkston or Mrs. Pinkston, or with Pinkston's money, for the money thus paid out by him; and if said mortgage by Pinkston to the bank was executed, as it pur-

ported to be, in good faith, to secure the debts therein stated; and said debts were due by him, in good faith, to said bank; and the slaves therein mentioned, including the slave now in suit, were sold under said mortgage, in February, 1849, and were bought at said sale, as aforesaid, by Moses McLemore; and the several instruments read in evidence—the deed from the bank to Moses McLemore, and from him to William J. McLemore, and from him back to Moses McLemore—were executed at the time they purport to have been; and said slave was in the defendant's possession at the commencement of this suit,—then the plaintiff is entitled to a verdict.

“5. Although Mrs. Pinkston may have made statements in a bill in chancery, which were sworn to by her, this does not preclude her from showing that she was mistaken: it is only an admission, and its being sworn to only raises a stronger presumption of the truth of the statement, or of her belief in its truth, but does not conclusively establish the truth of such statement, if there is sufficient evidence before the jury to satisfy them that she was mistaken, either as to the truth of the statement, or as to the inferences which she or others might draw from it.

“6. That the order, judgment, or decree, made in the case of Brewster, Solomon & Co. and others against Pinkston and Whitesides, which had been read in evidence, is not such a final order or decree that an execution could issue on it, except for costs.

“7. That the execution issued in said cause is void.

“8. That the decree in said cause cannot be looked to or regarded by the jury for any purpose, and the execution issued on it cannot be looked to or regarded by them for any purpose.”

The court refused each of these charges, and the plaintiff excepted to their refusal.

The court charged the jury, at the request of the defendant, “that if they believed, from the testimony, that the assignment read in evidence was executed at the time of its date, and that the debts mentioned in it were real

and *bona fide*, and that said Pinkston accepted the assignment, and took possession of all or part of the goods and notes assigned, and sold the goods so taken possession of in 1838, and failed or neglected to pay over the money received from the sale to the creditors who were entitled to it under said assignment; and if they believe, also, that the decree read in evidence was based upon such failure or neglect, and that an execution was issued on said decree, and was levied by the defendant, as sheriff, on the slave sued for; and that said slave was sold by the defendant, under said levy; and that said Pinkston, in 1839 or 1840, made with his said wife the contract stated in the bill in chancery in which she was complainant, which had been read in evidence by the defendant; and that said slave was purchased with the earnings of Mrs. Pinkston, derived from said contract,—then said slave was subject to the execution issued on said decree in chancery against said Pinkston." The plaintiff excepted to the giving of this charge.

All the rulings of the court to which, as above stated, exceptions were reserved by the plaintiff, are now assigned as error.

THOS. WILLIAMS, and JNO. A. ELMORE, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

A. J. WALKER, C. J.—[June 7, 1861.]—It was objected in the circuit court that there was no decree for the payment of money, upon which the *fiery facias* levied by the defendant could issue. We think the decree of the chancellor in which he makes a reference to the register, and the decree confirming the register's report, when construed together, and in reference to the bill and to the report confirmed, amount to an order for the payment of the several sums of money reported by the register to be due by the defendants severally to the respective creditors, notwithstanding the gross informality of the decrees. *Huffaker v. Boring*, 8 Ala. 88; *Harland v. Eastland*, *Hardin*, 500; *Honore v. Colmesnil*, 1 J. J. Marsh. 506.

[2-3.] Mrs. Pinkston being the party really interested, and for whose benefit the suit was brought, as shown both by the complaint and the evidence, her admissions were competent evidence in favor of the adverse party. The bill in chancery, which was given in evidence, was sworn to by her, and was, therefore, not the mere allegation of counsel, but a statement of facts, admissible against her. *Durden v. Cleaveland*, 4 Ala. 225. Her coverture at the time when the affidavit was made of the truth of her separate bill, does not exempt her from the operation of the rule, that declarations are evidence against parties making them. The separate answer of a *feme covert*, made under oath by her, is admissible against her; and so also must be her separate bill, when sworn to by her.—1 Dan. Ch. Pl. & Pr. 196. For these reasons, there was no error in the admission of Mrs. Pinkston's bill in evidence against the plaintiff in this suit.

[4.] It has been decided in this State, that the husband of a distributee of an estate would not be a competent witness for the contestants of a will, where the interest of such distributee would be enlarged by the setting aside of the will.—*Walker v. Walker*, 34 Ala. 469. Of course, the distributee would, under like circumstances, be an incompetent witness. A recovery by the plaintiff, in this case, would have precisely the same effect, in swelling the distributive share of the distributees of Mrs. Pinkston's estate, as the setting aside of the will in the case cited would have had. We therefore decide, upon the authority of that case, that a distributee of the estate of Mrs. Pinkston is an incompetent witness for the plaintiff; and that there was no error in the refusal to permit James K. Pinkston, who was a distributee, to testify.

[5.] The argument, upon which the defense in this case rested, was, that the slave in controversy was sold under a mortgage executed by James K. Pinkston; that the slave was bought at that sale by Moses McLemore; that Moses McLemore conveyed the slave to Wm. J. McLemore, who conveyed her back to Moses McLemore, in trust for the separate use of Mrs. Pinkston, the wife of

James K. Pinkston; that the money, with which Moses McLemore bought and paid for the slave, was furnished by Mrs. Pinkston; that this money, as to the creditors of James K. Pinkston, was, upon the principle settled in *Pinkston v. McLemore*, (81 Ala. 608,) the property of the husband; that the complicated transaction, which resulted in a conveyance to Mrs. Pinkston, was a contrivance to vest her with the title; and that the whole transaction amounted to nothing more than a gift by James K. Pinkston to his wife, which was void as to the debts under which the property was sold, because they were existing at the time of that transaction. The plaintiff offered to introduce evidence, for the purpose of showing that the money received by Moses McLemore from Mrs. Pinkston was not appropriated to the payment for the slave, but in a different manner. We do not say that the purpose, for which the evidence was offered, was illegal; but we think the means by which it was proposed to make the proof, was wholly inadmissible. The chancery record, which was offered in evidence for that purpose, was *res inter alios acta* as to the defendant, and, therefore, not evidence against him for any purpose.

[6.] One of the objections made to the first charge given by the court, is, that a trustee, under a deed of trust made for the benefit of creditors residing in another State, does not become the debtor of the creditors, when he receives moneys which, by the terms of the deed, were to be paid over to such creditors; but that he could only become the debtor of the creditors, after a violation by the trustee of his duties, or after demand made by the creditors. This question is conclusively settled, adversely to the appellant who makes the objection, by the decisions of this court in the cases of *Foot v. Cobb*, (18 Ala. 585,) and *Gannard v. Eslava*, (20 Ala. 722.) In the former of those cases, it was decided, that an agent, who has sold the slave of his principal on a credit, and promised to pay the purchase-money, when collected, to his principal, is, within the meaning of the statute of frauds, a debtor; and in the latter, that the grantor in a deed containing a

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general covenant of warranty, there being an outstanding adverse title, was a debtor of the grantees, within the meaning of the same statute.—See, also, *Hitchcock v. Lukens*, 8 Por. 333. The fact that the creditors resided in another State, can make no difference. No distinction can be predicated upon the residence of the creditors.

[7.] We do not think this charge obnoxious to any of the other objections made to it. It is certainly not abstract. The evidence, according to the bill of exceptions, certainly conduced to show, that Pinkston, the trustee, received money belonging to the trust within three months after the date of the deed of trust, (Feb. 3, 1838;) and the bill in chancery of Mrs. Pinkston shows, that the agreement between her and her husband was made in 1839 or '40; so that the bill of exceptions positively indicates a tendency of evidence to support the proposition, that the indebtedness of Pinkston existed before the agreement between himself and his wife was made. If, however, this were not the case, we would presume, in favor of the charge, that it was not abstract; there being nothing in the record to the contrary.

[8.] In the case of *Pinkston v. McLemore*, (31 Ala. 308,) it is distinctly decided, that the contract between Pinkston and his wife was void, as to the existing creditors of the former; and that the earnings of the wife, and the servants put under her control, under that contract, were, as to such existing creditors, the property of the husband. It follows, that if the slave in controversy was bought by McLemore, the plaintiff, for the separate use of Mrs. Pinkston, with her earnings accruing under the agreement with her husband, then the transaction was, as to those who were the husband's creditors at the time of such agreement, a purchase of the property for the wife, with the husband's money. The property so purchased would, as to creditors, belong to the husband, and be liable to their demands. We understand the charge to assert nothing more than this.

[9.] The plaintiff asked eight charges, which were severally refused. The first four of these charges affirm

the plaintiff's right to a verdict, if the jury believe certain facts therein specified. The facts specified in each one of those charges, whatever might be their legal effect, if not met and avoided by other facts, certainly do not rise to an irresistible inference in favor of the plaintiff's right to a recovery. For example: if it be conceded that, upon the facts presented in each one of those several charges, a title, good as to the creditors of Pinkston, would have vested in the plaintiff; yet no right to a recovery would result, upon those facts, if it was shown in reply, that such title had been, before the levy by the defendant, divested in some legal manner, and vested in Pinkston, the defendant in execution. The bill of exceptions does not profess to set out all the evidence, and we can not presume that it does.—*S. M. Lea Co. v. Holcombe*, 35 Ala. 227. As the facts upon which the plaintiff, in the charges asked, predicated his claim to a verdict, were of such a nature that their legal effect would be susceptible of being avoided by other facts; and as the bill of exceptions does not inform us whether or not such other facts existed, we can not decide that the refusal of those charges was erroneous. We can not presume, for the purpose of attributing error to the court, the non-existence of the facts requisite to justify those refusals.—*Phillips v. Peteet*, 35 Ala. 696; *Rupert v. Elaton*, *ib.* 79; *Wyatt v. Stewart*, 34 Ala. 716; *Dackworth v. Butler*, 31 Ala. 164.

[10.] In refusing the fifth charge requested, the court erred. A party is not estopped from denying the averments of a bill in chancery, although sworn to, when they are offered in evidence, in an independent suit, against such party. The charge was not abstract; for the bill of exceptions sets forth evidence of a payment for the slave, in a bill of exchange accepted by Mrs. Harper, which had been collected by McLemore from the acceptor.

From what has already been said; as to the admissibility of the execution in evidence, it results that the 6th, 7th, and 8th charges requested, were properly refused.

There was no error in giving the charge which was

asked by the defendant. The reasons are indicated in our remarks as to the first charge given.

Reversed and remanded.

HEATH vs. DEVAUGHN.

[SLANDER.]

1. *What words are actionable.*—Words spoken of another, imputing to him the statutory offense of trading with slaves, (Code, § 3285,) are not actionable, since the offense does not involve moral turpitude, and the punishment affixed to it is not infamous.

APPEAL from the Circuit Court of Chambers.

Tried before the Hon. JOHN GILL SHORTER.

The complaint in this case was in the following words:
 "James Heath } The plaintiff claims of the de-
 vs. } fendant ten thousand dollars as dam-
 Samuel Devaughn. } ages for falsely and maliciously
 charging him with the crime of trading with slaves, by
 speaking of and concerning him, in the presence of divers
 persons, in substance as follows: 'Have you not been
 trading with my negroes'? (meaning the negro slaves of
 defendant;)' 'You have been trading with my negroes, you
 old rascal'—to-wit, on the 17th August, 1857.

"The plaintiff claims of the defendant ten thousand dollars, also, as damages for falsely and maliciously charging him with the crime of trading with slaves, without the consent of the master, owner, or overseer of such slaves, by speaking of and concerning him, in the presence of divers persons, in substance as follows: 'Have you not been trading with my negroes'? 'You have been trading with my negroes, you old rascal'; 'He has

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been trading with my negroes '—to-wit, on the 17th August, 1857."

The court sustained a demurrer to the complaint, on the ground that none of the words charged were actionable; and its ruling is here assigned as error.

BROCK & BARNES, for appellant, cited the following cases: Cogburn v. Harwood, Minor, 93; Perdue v. Burnett, *ib.* 138; Hillhouse v. Peek, 2 Stew. & P. 395; Johnson v. Morrow, 9 Porter, 525; Dudley v. Horn, 21 Ala. 379; Smith v. Gaffard, 31 Ala. 45; Bissell v. Cornell, 24 Wendell, 354; Brooker v. Coffin, 5 Johns. 188; 13 Johns. 124, 275.

ALLISON & ANDREWS, *contra*, cited Brooker v. Coffin, 5 Johns. 188; Widrig v. Oyer, 13 Johns. 124; Martin v. Stillwell, 13 Johns. 275; Gibbs v. Dewey, 5 Cowen, 503; Fox v. Vanderbeck, 5 Cowen, 513; Goodrich v. Wolcott, 3 Cowen, 231; S. C., 7 Cowen, 714; Demarest v. Haring, 6 Cowen, 76; Shaffer v. Kintzer, 1 Binney, 542; Frisbie v. Fowler, 2 Conn. 707; Chapman v. Gillett, 2 Conn. 61; Hopkins v. Beedle, 1 Caines' Rep. 347; Walker v. Winn, 8 Mass. 248; Miller v. Miller, 8 Johns. 58; Sheely v. Biggs, 2 Har. & J. 363; House v. House, 5 Har. & J. 125; Dodds v. Henry, 9 Mass. 262.

STONE, J.—[July 5, 1861.]—We deem it unnecessary, in this case, to consider whether the language averred in the complaint to have been spoken by the defendant, sufficiently identifies and charges the offense denounced by section 3285 of the Code.—See Code, § 2224; Perdue v. Burnett, Min. 138; Sturgenegger v. Taylor, 2 Brev. 480. On another ground, we think the judgment of the circuit court must be affirmed. The punishment for trading illegally with slaves is a money fine, to which may be added imprisonment in the county jail, not exceeding six months. A mere trading with slaves, without the consent of the master, owner, or overseer of such slaves, does not, *per se*, involve moral turpitude; and the punishment

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is not *infamous*, in that sense which constitutes the words actionable of themselves.—Hillhouse v. Peck, 2 S. & P. 395; Johnson v. Morrow, 9 Por. 525; Dudley v. Horn, 21 Ala. 379; Andress v. Koppenhefer, 3 S. & R. 255; McClung v. Ross, 5 Bin. 218; Birch v. Benton, 26 Mo. (5 Jones,) 153; Speaker v. McKenzie, *ib.* 255; Quinn v. O'Gara, 2 E. D. Smith, 388; Young v. Miller, 3 Hill, 22; McKee v. Ingalls, 4 Scam. 36. See, also, Shuttleworth v. The State, 35 Ala. 415, and authorities on appellee's brief.

Judgment of the circuit court affirmed.

EX PARTE NORTH-EAST & SOUTH-WEST ALA. RAILROAD COMPANY.

[APPLICATION FOR WRIT OF HABEAS CORPUS TO CIRCUIT COURT.]

1. *Legislative power to alter summary remedy of corporation against defaulting stockholders.*—A summary remedy against defaulting stockholders, given to a corporation by the act of its incorporation, is no part of its corporate franchises, and may be altered or modified by the legislature at pleasure.
2. *"Stay-law" applies to summary proceedings.*—The first section of the act "to regulate judicial proceedings," approved the 8th February, 1861, and commonly known as the "stay-law," (Acts of Called Session of 1861, p. 3,) which prohibits the rendition of judgment at the return term of any "suit, writ, summons, complaint or bill," applies to a summary proceeding by notice and motion, on the part of an incorporated railroad company, against a delinquent stockholder; although the charter of the company authorizes the rendition of judgment in its favor at the return term of the notice, provided it has been served twenty days previous thereto.
3. *Continuance and discontinuance of summary proceeding.*—A summary proceeding by notice and motion will be discontinued, unless some action is had on the notice at the return term, although the "stay-law" prohibits the rendition of judgment at that term; yet the

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plaintiff may keep alive his notice, by having it docketed, according to the rule of practice adopted at this term, or by some action of the court continuing its existence.

APPLICATION for a *mandamus* to the circuit court of Tuscaloosa, Hon. WM. S. MUDD presiding, to compel that court to render judgment in a certain cause therein pending, wherein the North-east and South-west Alabama Railroad Company was plaintiff, and one John McClelland was defendant. The plaintiff was incorporated by an act of the legislature of this State, approved Dec. 12, 1853, (Session Acts 1853-4, p. 270;) and the 14th section of its charter gave it a summary remedy by notice and motion against delinquent stockholders, or subscribers for stock. The suit was commenced by notice, which was served on the defendant more than twenty days before the return term. The circuit court refused to render judgment at the return term, on the ground that the fourth section of the "stay-law" of February 8, 1861, applied to such cases; and this refusal is made the ground of the present application to this court.

E. W. PACK, for the motion.

R. W. WALKER, J.—[July 12, 1861.]—By the 14th section of the act "to incorporate the North-east and South-west Alabama Railroad Company," it is provided, that upon the failure of any stockholder to pay his calls of stock, the corporation "may move the circuit court of the county in which the stockholder resides, for judgment at the time at which such motion is made, twenty days' notice being given him of said motion. The notice may be issued by the president of the corporation, and served by the sheriff, who shall be entitled to one dollar therefor, to be taxed in the bill of costs; and upon such judgment, execution shall issue as in other cases."—Acts 1853-4, p. 275.

[1.] Of the power of the legislature to control and modify, at its pleasure, the summary remedy here bo-

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stowed upon the corporation, to the same extent that it can regulate the remedies for the enforcement of contracts between private individuals, we entertain no doubt. *Bank of Columbia v. Okely*, 4 Wheat. 244-5; *Howard v. Ky. & Lou. Ins. Co.*, 13 B. Monr. 285-6; *Angell Corp.* § 769.

[2.] The question is, whether the legislature has exercised the power here asserted. The court below decided that it has, and held, that the remedy given by the 14th section of the act of incorporation is so far affected by the act approved February 8, 1861, commonly known as "the stay-law," that the corporation is not entitled to have its motion heard at the term to which the notice is returned, although the notice has been served more than twenty days before the motion is made.

The 1st section of the act last referred to provides, "That hereafter, in the commencement of any suit in any of the courts of law or equity in this State, the court to which any suit, writ, summons, complaint, or bill, may be made returnable, shall be deemed and held as the return term of such suit, writ, summons, complaint, or bill, and the same shall stand for trial at the next succeeding regular term of such court appointed by law to be holden after such return term; and the parties in the law courts shall not be required to plead at the first term, except that pleas in abatement shall be filed as now required by law."—Acts of Called Session of 1861, p. 3.

The language here employed is certainly as comprehensive as could be desired. The words of this section, standing by themselves, are broad enough to embrace a summary proceeding, by notice and motion, in the circuit court. Such a proceeding is a suit in a court of law; and the words here used are, "in the commencement of any suit in any of the courts of law or equity in this State, the court to which any suit, writ, summons, complaint, or bill, may be made returnable," &c. The use of all these terms clearly implies, that the statute was intended to apply to suits not begun by writ, summons, or complaint, as well as to those which are. In Alabama &

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Tennessee Rivers R. R. Co. v. Harris, (25 Ala. 232,) it was held, that a proceeding by notice and motion on the part of a railroad company, against a delinquent stockholder, is "a suit" within the meaning of section 2398 of the Code. So, in *Ex parte Robbins*, (29 Ala. 77,) it was declared that an action, commenced by original attachment, is within the provisions of section 2396 of the Code, though the words of that section, literally construed, seem applicable only to suits begun by summons and complaint. In *Stanley v. Bank of Mobile*, (23 Ala. 662,) it was held that, in a proceeding by notice and motion, the issuing of the notice is the commencement of the suit, and prevents the statute of limitations from creating a bar, although the motion for judgment is afterwards delayed. And the notice serves the double purpose of writ and declaration.—*Jemison v. P. & M. Bank*, 17 Ala. 754; *Stanley v. Bank*, *supra*; *Griffin v. Bank*, 6 Ala. 908 (910).

But we are not left alone to the words of the 1st section. The 5th section provides, that "the provisions of this act shall not be held to apply to suits of any descriptions or judgments in any court against defaulting public officers, for failing to pay over money, or for any breach of the duties required of them by law." It is plainly to be implied from this, that, but for the special exception here made, summary proceedings by notice and motion against sheriffs and other public officers, would be subject to the provisions of this act. The object of the legislature was to reach all suits, except those especially named in the 5th section; and suits in which judgment is obtained on notice and motion, are as much within the intention of the law, as those commenced in the usual mode.

[3.] The rule declared in our former decisions, in reference to proceedings by notice and motion, is, that some action must be had on the notice at the time specified in it; or the law will presume that the party has abandoned his intention of proceeding on it, and he cannot afterwards move the court for judgment on such motion.—

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Broughton v. Bank, 6 Porter, 48; Armstrong v. Robertson, 2 Ala. 164; Gary v. Bank, 11 Ala. 771; Evans v. Bank, 12 Ala. 788. Under the act of February 8, 1861, the motion cannot, as we have seen, be heard at the return term of the notice, against the objection of the defendant; but the plaintiff can keep alive his notice, by having it docketed, according to the rule adopted at this term, or by any action of the court continuing its existence; and it will then stand for trial at the next succeeding regular term.

As the ruling of the circuit court was correct, we need not inquire whether there would have been a remedy by *mandamus*, if it had been erroneous.

Motion overruled.

ANDERSON'S EX'R vs. ANDERSON'S HEIRS.

[FINAL SETTLEMENT OF EXECUTOR'S ACCOUNTS.]

1. *Married woman's law of 1848 not retroactive.*—The law is settled in this State, that the act of March 1, 1848, securing to married women their separate estates, does not affect the husband's right to reduce to possession his wife's choses in action which accrued prior to the passage of that statute.
2. *Husband's marital rights; reduction of wife's choses in action to possession; distribution of decedent's estate by consent.*—Where the slaves belonging to a decedent's estate remain undivided, after the payment of his debts and the final settlement of the administration on his estate, and are afterwards divided by consent among the several distributees, who execute reciprocal conveyances to each other for their respective shares;—the husband of one of the female distributees thereby acquires a complete equitable title to the slaves allotted to him and his wife; and, on his death, while thus in possession of them, his personal representative is chargeable with them as belonging to his estate.
3. *Allowance of counsel fees to executor.*—On final settlement of the accounts of an executor or administrator, he is not entitled to a

credit for counsel fees paid by him on account of services rendered in contesting a proper charge against him.

4. *Allowance of fees to guardian ad litem.*—An executor or administrator can not complain, on error, of the allowance of compensation to the guardian *ad litem* of the infant distributees, on final settlement of his accounts and vouchers, since he is not thereby prejudiced.

APPEAL from the Probate Court of Greene.

IN the matter of the estate of James A. Anderson, deceased, on final settlement of the accounts and vouchers of John B. Thompson, the executor. The executor asked leave of the court to amend his inventory, by striking out the names of several slaves which were included therein, on the ground that they were so included by mistake; and to allow him a credit for \$450, paid by him to the testator's widow, to whom he had surrendered said slaves, for their hire during the time he had retained them. The distributees resisted each of these motions, and also moved the court to charge the executor with the hire of said slaves from the time he delivered them up to the widow. On the evidence adduced touching these matters, (the material portions of which are stated in the opinion of the court,) the probate court decided each of the motions against the executor; and he reserved exceptions to its several rulings, as also to its refusal to allow him a credit for counsel fees paid by him, for services rendered on the settlement, and to the allowance of compensation to the guardian *ad litem* of the infant distributees. All the rulings of the probate court, to which exceptions were reserved by the executor, are now assigned as error.

WM. P. WEBB, for appellant.

W. COLEMAN, *contra*.

A. J. WALKER, C. J.—[July 18, 1861.]—The main question in this case is, whether the appellant was chargeable, upon the final settlement of his accounts, as the executor of the will of James A. Anderson, deceased, with

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a negro woman, Jane, and her children, and with their hires. The appellant's testator died in possession of the slaves, and they were included in the inventory as a part of the estate of the deceased. But the executor afterwards delivered the slaves to the widow, and paid hire to her up to the time of delivery. The executor was legally justifiable in delivering the slaves, and paying hire for them to the widow, if they belonged to her. For the executor it is contended, that the slaves belonged to the widow; and for the children, that they were the property of the testator. It appears from the bill of exceptions, that the wife of James A. Anderson, the deceased, is the daughter of John Spaight; that John Spaight died in 1825, leaving a widow and three children; that the slave Jane belonged to his estate; that there was an administration upon the estate; that there was a final settlement of the administration, and a discharge of the administrator and administratrix; that the debts of the estate were paid; that Jane and the other slaves of the estate were left undivided, and, after the settlement of the administration, remained collectively under the charge of the administratrix, who was the widow of the deceased, and her son; that in 1842 the appellant's testator intermarried with Elizabeth V. Spaight, one of the distributees of Spaight's estate, and that then the widow of Spaight placed Jane in the possession of the testator and his wife, to be held as a loan until a division was had; that the children of Jane have been born since that time; that Jane and her children remained in the possession of James A. Anderson, the testator, until 1849, when the distributees of the estate of Spaight made a division of the slaves belonging to that estate, including Jane and her children, and joined in a conveyance, reciprocally conveying to each other their respective shares; that Jane and her children were allotted to Anderson and his wife, and that they afterwards were in the possession of Anderson, until he died. Upon these facts, did Jane and her children belong to Anderson, or to his wife, at the time of his death?

Without deciding the point, we grant, for the purposes of this opinion, that, until the division in 1849, the slaves Jane and her children belonged to the estate of John Spaight, deceased; and that the *status* of the slave property of that estate was such, that an absolute right to his wife's interest in it did not vest in James A. Anderson, *jure mariti*, before the division in 1849. By marriage, a husband had, by the common law, a right to reduce his wife's choses in action to possession, and thus acquire a title to the same during the coverture. The first statute securing to married women their separate estates, was adopted on the 1st March, 1848. From 1842 to March 1st, 1848, James A. Anderson's relation to his wife's chose in action, consisting of a lawful claim to a distributive share of the slaves of her deceased father's estate, was governed by the common law. The common law gave him a right to reduce his wife's distributive share to possession, at any time during the coverture. This right was not taken away by the adoption of the married woman's law of March 1st, 1848, but remained as complete and effective after the passage of that law, as it was before. The law has been so settled in this State by the decisions in *Kidd v. Montague*, (19 Ala. 619,) and *Sterns v. Weathers*, (30 Ala. 712.) See, also, *Manning v. Manning*, 24 Ala. 386; *Hardy v. Boaz*, 29 Ala. 168; *Sharp v. Burns & Coles*, 35 Ala. 658.

It is probable, that the position which has been taken in this State, upon this subject, is irreconcilable with the position of the appellate court of Mississippi, in reference to a kindred question.—*Clark v. McCreary*, 12 S. & M. 347; *Duncan v. Johnson*, 23 Miss. 180. But the doctrine announced by this court necessarily controls the title of property to a large extent, and, having been recognized as law for ten years, is not now open for controversy. We do not wish, however, to be understood as insinuating a doubt of the correctness of it; for we are inclined to think, that it is sustained by satisfactory reasoning in the decision of *Kidd v. Montague*, where it was first announced.

[2.] By virtue of the principle above stated, James A. Anderson had a right, notwithstanding the act of March 1st, 1848, to go on and reduce to possession his wife's distributive interest in the slaves of her father's estate; and if he did so in his life-time, a complete title vested in him, to the exclusion of his wife. The division, by the concurring consent of all the distributees, may not, according to previous decisions of this court, have had the effect of vesting the respective distributees with the legal title. But, as the debts of the estate were paid, and a final settlement of the administration had been effected, the division, and reciprocal conveyances of the distributees, certainly had, at least, the effect of investing each with the equitable title.—*Marshall v. Crow*, 29 Ala. 278; *Vanderveer v. Alston*, 16 Ala. 494; *Bethea v. McColl*, 5 Ala. 308; *Miller v. Eatman*, 11 Ala. 609. A court of chancery would, upon a suitable application, have ordered a division; and those who were interested may, by consent, do that which might have been accomplished through the agency of a court of chancery. The wife of James A. Anderson having, by the division and deed, acquired a title to the slaves Jane and her children, even though it was purely equitable, and having possession thereafter, the husband, by virtue of his right to reduce to possession his wife's choses, acquired at least an equitable title, which is not affected by the married woman's law.

The executor was guilty of a palpable breach of duty in surrendering the property thus held by his testator, and the court properly charged him on account thereof.

[3.] The executor was not entitled to a credit for the fee paid his counsel, on account of services rendered in support of the attempt to relieve himself from the charge for the slaves Jane and her children. The litigation upon that subject was produced by his own error, and by an attempt to obtain the sanction of that error by the court. For the fees of counsel in such a litigation, the estate ought not to be charged.—*Smith v. King*, at June term, 1860.

[4.] If there was any error in making the allowance to

the guardian *ad litem*, it was one which did not prejudice the appellant.

It is not necessary for us to notice the rulings on questions of evidence. They have not been presented by counsel in argument; and it is very clear that the court has committed no error in those rulings, which would have changed the result.

Affirmed.

LAWRENCE vs. JONES.

[MOTION TO AMEND EXECUTION.]

1. *Damages on affirmance of judgment.*—On the affirmance of a judgment which has been superseded, (Code, § 3032,) the ten per cent. damages should be computed on the amount of the original judgment, and not on that sum with the interest thereon up to the time of the affirmance.

APPEAL from the Circuit Court of Montgomery.

Tried before the Hon. JOHN K. HENRY.

THE appellant in this case recovered a judgment against the appellees, in the circuit court of Montgomery, on the 9th June, 1859, for \$8,000 damages, besides costs. The defendants removed the case, by appeal, to the supreme court, and gave bond with surety to supersede the judgment. The judgment was affirmed by the supreme court, at its June term, 1860; and that court rendered a judgment against the defendants, "for the amount of said judgment, ten per cent. damages thereon, and costs." When this judgment was certified to the circuit court, the clerk of that court issued an execution against the defendants, for \$8,000, the amount of the original judgment, "and \$800 damages awarded by the supreme court, besides the sum of \$76 25 costs." At the next

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ensuing term of the circuit court, the plaintiff moved to amend the execution, by striking out \$800, as the damages awarded by the supreme court, and inserting in lieu thereof ten per cent. of the original judgment with the interest thereon up to the day of the affirmance. The circuit court overruled the motion, and the plaintiff excepted to its decision; and he now assigns the same error.

GOLDTWHAIT, RICE & SEMPLE, for appellant.

WATTS, JUDGE & JACKSON, *contra*.

STONE, J.—[February 27, 1861.]—Section 3032 of the Code declares, that when a money judgment, which has been superseded by appeal to this court, and bond with surety given, is *affirmed* in this court, the judgment here rendered shall be “for the amount of the affirmed judgment, ten per cent. damages thereon, and the costs of the supreme court.” In this case, we are required to decide, whether the ten per cent. damages is limited to the sum shown in the face of the judgment appealed from, or includes that sum with interest thereon up to the time of the affirmance.

If this were a new question, uncontrolled by the previous practice of the courts, it might admit of controversy, what is the true *amount* of the affirmed judgment, on which the ten per cent. damages should be computed. We do not, however, feel at liberty to enter upon this inquiry at the present advanced epoch in our judicial history. A statute, similar to the one under discussion, was in force in this State for forty years.—See Clay's Digest, 309, § 20. We are convinced, that the uniform practice of the courts has been, to compute the damages only on the principal sum of the judgment. “This having been the construction of the act for so long a time, and the practice having been so universal, we do not feel at liberty to disturb it.”—*Jama v. Rice*, 17 Ala. Affirmed.

HARRISON vs. McCRARY.

[BILL IN EQUITY FOR SPECIFIC PERFORMANCE OF AWARD, SETTLEMENT OF PARTNERSHIP ACCOUNTS, INJUNCTION, &C.]

1. *Injunction of action at law.*—A court of equity will not enjoin an action at law for a trespass, on the ground that the plaintiff therein is, and was at the time of the alleged trespass, indebted to the defendant on account of other matters, and is insolvent.
2. *Dissolution of injunction, without dismissal of bill.*—An injunction may properly be dissolved for want of equity, where the allegations of the bill are not sufficient to authorize the interference of the court by injunction, although the bill may be retained for other relief.

APPEAL from the Chancery Court of Dallas.

Heard before the Hon. JAMES B. CLARK.

THE complainant in this case, L. C. Harrison, and P. R. McCrary, the defendant, formed a mercantile partnership in October, 1851; the business to be conducted in the town of Summerfield, in Dallas county, and to continue for the period of five years, unless sooner dissolved by agreement. On the 22d December, 1858, Harrison bought out McCrary's interest in the firm, and employed him, at a fixed salary, to collect the outstanding debts; and the profits and losses of the business up to that time, as shown by the books, were adjusted between them by written agreement. It was soon afterwards discovered that the data on which this agreement was based were incorrect, and the parties thereupon entered into another written agreement, which provided, in substance, that the settlement between them should be made according to the principles of the original articles of partnership, instead of the second agreement above mentioned. Not being able to settle the partnership accounts between themselves, the parties entered into a written agreement, under seal, dated the 28d September, 1857, to submit the matters in dispute to

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arbitration; the award to be entered up as the judgment of the circuit court, under the provisions of the Code. On the 4th May, 1858, an award was made by two of the arbitrators, deciding that McCrary was indebted to Harrison in the sum of \$5,767 57. This award was filed in the office of the circuit clerk, and an execution was thereon issued against McCrary, which was levied on four slaves; and these slaves were afterwards sold under the execution, and were purchased at the sale by Harrison. At the term of the circuit court to which the execution was returnable, McCrary made a motion to quash it, and to set aside the award; and his motion having been overruled, he excepted to the ruling and decision of the circuit court, and sued out an appeal to the supreme court, where, at the June term, 1860, the judgment of the circuit court was reversed, and the cause remanded,—the supreme court holding, that “the award was, at least *prima facie*, void.”—See the case reported in 36 Ala. 577. Soon after the levy of the execution on the slaves, (at what precise time does not appear,) McCrary brought an action of trespass against Harrison, to recover damages for the taking of the slaves; and that action was pending on the 7th July, 1860, when Harrison filed his bill in equity against McCrary,—alleging, in addition to the facts above stated, that McCrary was largely indebted to him on account of the partnership transactions between them, and was insolvent. The prayer of the bill was, that the action at law might be perpetually enjoined, and the award specifically performed; or, in the event the court should decline to decree a performance of the award, that an account might be taken of all the partnership transactions, and that the value of the slaves, with their hire, might be applied to the satisfaction, *pro tanto*, of the amount which might be found due to the complainant; and the general prayer, for other and further relief, was added. On the filing of this bill, an injunction was granted by a circuit judge. After putting in an answer, in which was incorporated a demurrer, the defendant moved the chancellor to dismiss the bill for want of equity, and to dis-

solve the injunction. On the hearing of this motion, the chancellor dissolved the injunction, but refused to dismiss the bill for want of equity; and the dissolution of the injunction is now assigned as error by the complainant.

BYRD & MORGAN, for appellant, cited Story's Equity, §§ 893-97, 901, 902, 905, 907, 957-58; Harrell v. Ellsworth, 17 Ala. 576; Burden v. Stein, 27 Ala. 104.

PETRUS, PEGUES & DAWSON, *contra*, cited Hamilton v. Adams, 15 Ala. 596; Wiggins v. Armstrong, 2 Johns. Ch. 144; Norris v. Norris, 27 Ala. 519.

R. W. WALKER, J.—[June 28, 1861.]—There was no error in the decree dissolving the injunction. The complainant admits that he committed a trespass in taking and carrying away the defendant's slaves; and he seeks to enjoin the action for that trespass, on the ground that the defendant is indebted to him on account of partnership transactions, and is insolvent. The well-settled rule, that a creditor at large, or before judgment, is not entitled to an injunction, to prevent the debtor from fraudulently disposing of his property, (Wiggins v. Armstrong, 2 Johns. Ch. 144; Mercer v. Downs, Hopkins Ch. 365,) would seem to be decisive against the right to an injunction in this case. For, if the creditor can take his debtor's property by force, to secure his debt, and hold on to it by enjoining the action of trespass, he is permitted to accomplish by force, sanctioned in equity, that which the court would not allow him to do without force. To suffer that to be done, would be a plain violation of the familiar and wholesome principle, that a right cannot grow out of a wrong.—See, further, Hamilton v. Adams, 15 Ala. 596. In addition to this, a court of law is the proper tribunal to ascertain the damages, to which a party is entitled for a trespass upon his property. 'Smart money,' or vindictive damages, can be recovered at law; but a court of equity cannot consider that question at all, and therefore cannot ascertain the damages.

The effect of sustaining the injunction, in such a case, must be to deny the right of the injured party to smart money.

It is hardly necessary to add, that where a bill does not warrant an injunction, the injunction may properly be dissolved, although the bill may be retained for other relief.—Norris v. Norris, 27 Ala. 529.

Decree affirmed.

WARD vs. CAMERON'S ADM'RS.

[APPLICATION FOR REVOCATION OF LETTERS OF ADMINISTRATION.]

1. *Presumption in favor of ruling of primary court.*—In a probate case, where the correctness of the ruling of the primary court depends on the proof, and the record does not purport to set out all the evidence on which the probate judge acted, the appellate court will presume that his decision was justified by the evidence.
2. *Revocation of letters of administration.*—If letters of administration are granted by the probate court, within forty days after the death of the intestate is known, in contravention of the order of preference prescribed by the statute, (Code, §§ 1668-69,) the largest creditor of the estate may proceed to obtain a revocation of such letters; but, to entitle him to make an application for that purpose, he must show that he is the largest creditor of the estate; and he cannot complain, on error, of the refusal of his application, when the record does not show that he proved that fact.

APPEAL from the Probate Court of Henry.

IN the matter of the estate of Angus Cameron, deceased, on the application of John Ward and Christopher Ward for the revocation of letters of administration previously granted to Sarah Cameron and Richard T. Hudspeth, and the grant of letters to themselves. The refusal of the application is assigned as error.

MARTIN, BALDWIN & SAYRE, for appellants.

PUGH & BULLOCK, *contra*.

A. J. WALKER, C. J.—[June 8th, 1861.]—An application was made by the appellants, for the repeal of the letters of administration of the appellees. The parties making the motion filed a petition, which is set out in the record. In the petition they claim to be the largest creditors of the estate. The entry of the judge, overruling the petition, does not set out all the evidence which was adduced on the trial, and there is no bill of exceptions. We have, therefore, presented the case, which has been unfortunately of very frequent occurrence, where the correctness of the ruling of the court below depends upon the proof, and we do not know what the proof was. In such case, we must presume in favor of the correctness of the judgment, and award an affirmance.—*Morgan v. Morgan*, 35 Ala. 303; *Taylor v. McElrath*, *ib.* 380; *Southern Ins. Co. v. Holcombe*, *ib.* 327; *Rupert v. Elston*, *ib.* 79.

[2.] It is not shown that the appellants proved that they were the largest creditors of the estate, or, indeed, that they were creditors at all. We have decided, that where an administrator was appointed within forty days, in contravention of the order of preference prescribed by the statute, the largest creditor of the estate might proceed to obtain a revocation of the administration.—*Curtis v. Williams*, 33 Ala. 570; *Curtis v. Burt*, 34 *ib.* 729. But, unless the petitioner was a creditor of the estate, he would have no right to move for a revocation of an irregular appointment, and no ground for complaint that the court overruled his motion. As it does not appear that the petitioners were creditors, we can not affirm that there was no sufficient reason for the action of the court.

Affirmed.

COKER vs. PITTS.

[SALE OF SLAVES BY PROBATE COURT FOR PARTITION.]

1. *When sale for partition may be decreed.*—Under the act of February 5, 1856, (Session Acts 1855–56, p. 20,) an order for the sale of slaves, for partition among the several joint owners or tenants in common, should not be granted by the probate court, on the application of the guardian of infants, without proof that the sale would be to the interest of the infants; but, when the application is made by adult part-owners, such proof is not necessary, although some of the parties interested are infants.

APPEAL from the Probate Court of Tallopoosa.

WM. H. BARNES, for appellant.

McCRAW & OLIVER, *contra*.

STONE, J.—[June 28, 1861.]—The present application, for the sale of slaves for division, was made under the act approved February 5th, 1856, which act was amendatory of the act of February 15th, 1854, and of section 2677 of the Code.—See Pamphlet Acts of 1855–6, p. 20; Acts of 1853–4, p. 7. The petitioners in this case were not guardians of *infants*, or *persons of unsound mind*; but petitioned in their own right, they being adults. The proof taken in the cause conclusively shows, that an equitable “partition or division” of the slaves can not be made without a sale; but it is not shown, that it would be to the interest of the infants, who are part-owners of this property, to sell the same. It is here contended, that the order of sale should not have been granted in the absence of such proof. In support of this position, the appellants rely on the 5th section of the act of February 5th, 1856, which declares, that, “before granting any application under this act, the said judge of probate must be satisfied by evidence, taken as in chancery cases, that an equitable partition or division can not be made; and, when the ap-

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plication is by the guardian of any one or more of the infants or persons of unsound mind, the judge of probate must not only be satisfied that such property can not be equitably divided, but that it would be to the interest of such infants or persons of unsound mind to sell the same for the purpose of partition and division."

This argument can not be maintained. It runs counter to the express language of the statute, and to the familiar maxim of the law, *inclusio unius est exclusio alterius*. Moreover, there is strong reason for requiring proof that the interest of the infants would be promoted by a sale, *when the guardian is the actor in the proceedings*. In such case, the guardian alone manifests a wish to sell; and sound policy would dictate that his wish should not be gratified, unless it would be to the interest of the infants to sell. The case is quite changed, when adult part-owners ask a sale for division. Their interests are coequal with those of the infants. Their right to have the possession of their property, and to have their wishes in the premises gratified, is to be respected equally with the interests of the infants. It would be monstrous to hold, that adult part-owners should be kept out of the enjoyment of their property, merely because other part-owners were infants, and the interests of such infants did not require that the property should be sold.

Judgment of the probate court affirmed. Let the costs of this appeal be paid by the appellant, Thomas J. Smith.

ALA. & TENN. RIVERS RAILROAD COMPANY vs.
OAKS & MILLS.

[ACTION AGAINST RAILROAD COMPANY AS COMMON CARRIER.]

1. *Examination of parties as witnesses, in appeal case from justice's court.*
In appeal cases from a justice's court, where the amount in contro-

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versy exceeds twenty dollars, the statute authorizing either party to be a witness in his own behalf, (Code, § 2779,) has no application to suits by or against corporations aggregate.

APPEAL from the Circuit Court of Shelby.

Tried before the Hon. JAMES B. MARTIN.

BYRD & MORGAN, for appellant.

R. W. WALKER, J.—[July 2, 1861.]—This was an appeal from a justice's court. The plaintiffs (who were partners) claimed over twenty, and less than fifty dollars; and one of them offered himself as a witness. He was objected to as incompetent to testify, on the ground that the defendant was a corporation; but the court overruled the objection; and permitted the witness to testify.

The Code provides, that "when the matter in controversy, or damages claimed, exceed twenty dollars, either party may be a witness in his own behalf, unless the party against whom the testimony is offered swears that the testimony proposed to be given is untrue."—Code, § 2779. The language here employed plainly implies, that this provision was designed to apply only to those cases, in which the party against whom the testimony is offered has the legal capacity to take an oath. A corporation aggregate can not take upon itself an oath, and upon that oath swear that the testimony proposed to be given is untrue. The section of the Code (§ 2313) construed in *Yonge v. Mobile & Ohio R. R. Co.*, (31 Ala. 422,) bears a strong resemblance to the one we are considering; and the decision of the court in that case supports the opinion just expressed, that the clause of section 2779, above quoted, has no application to suits by or against corporations.

Judgment reversed, and cause remanded.

A. J. WALKER, C. J., not sitting.

COATE vs. COATE'S ADM'R.

[TROVER FOR CONVERSION OF SLAVES.]

1. *Competency of transferror as witness for transferees.*—A distributee of an estate, who is shown to have released to the other distributees his interest in the subject-matter of a suit brought by the administrator, in his representative character, is not incompetent as a witness for the plaintiff under section 2290 of the Code.
2. *Competency of distributee as witness for administrator.*—But such distributee, notwithstanding such release, is not a competent witness for the administrator, on the ground of interest, although he might be rendered competent by a release of his entire interest in the estate.
3. *Competency of witness as affected by interest.*—An obligor in a bond given under section 1691 of the Code, when administration is committed to the general administrator, the sheriff, or the coroner, conditioned for the payment of the fees and allowances made by the court on such administration, "if the property of the estate is insufficient therefor," is not, under section 2302 of the Code, incompetent as a witness for such administrator, in an action brought by him in his representative character.

APPEAL from the Circuit Court of Clarke.

Tried before the Hon. JOHN K. HENRY.

THIS action was brought by E. P. Chapman, as the administrator of William F. Coate, deceased, against Burr J. Coate, to recover damages for the conversion of several slaves. The defendant pleaded not guilty, and the statute of limitations of six years, with leave to give any special matter in evidence. "On the trial," as the bill of exceptions states, "the plaintiff introduced one Andrew J. Coate as a witness; to whose competency the defendant objected, on the ground that he was interested in the event of this suit, and that the record in this suit would be evidence for him in another suit; and proved to the court, that plaintiff's intestate died, leaving no children, and that said witness was his brother, and one of

the distributees of his estate. The plaintiff then offered an instrument of writing, which was proved to have been executed and delivered by said witness, dated the 24th September, 1860; by which he released and conveyed to Mary E. Toland and John S. Coate all his right and title, both at law and equity, in and to the slaves which are the subject of this suit, and their hire; and proved to the court, that said Mary E. Toland and John S. Coate were, besides said witness, the only distributees of said estate. The defendant still objected to the competency of said witness, on the ground above stated, and because said instrument was but a transfer of said witness' interest in the subject-matter of the suit. The court overruled both of said objections, and permitted said witness to testify for the plaintiff; and the defendant excepted. The defendant further objected to the competency of said witness, on the ground that he was one of the makers of a bond, indemnifying said plaintiff, as the administrator of said estate, against any fees and allowances for which he might be liable beyond the assets of said estate; and read said bond in evidence, after proving its execution. The court overruled this objection, and the defendant excepted." The condition of said bond, after reciting that letters of administration on the estate of said intestate had been granted, on the application of said John S. Coate, to E. P. Chapman, the sheriff of the county, was, that "if said John S. Coate shall well and truly pay, or cause to be paid, such fees and allowances as may be made by said court on such administration, if the property of the estate is insufficient therefor, then this obligation to be void," &c. The overruling of the several objections to the competency of the witness, and permitting him to testify, are the only matters assigned as error.

DICKINSON & KILPATRICK, for appellant.

WILLIAM BOYLES, *contra*.

A. J. WALKER, C. J.—[June 6, 1861.]—The objection that Andrew J. Coate was incompetent, because he was

a transferrer, offered as a witness to establish a right transferred by him, is not to be decided upon the decisions of this court made before the adoption of the Code. The subject is covered by the Code, and the question must be determined by reference to section 2290 of the Code, and the construction of it which has been adopted. The precise objection which we are considering, was made and overruled, in the case of *Robinson v. Tipton*, (31 Ala. 595,) and by that decision we are willing to abide.

[2.] This court is committed to the proposition, that the distributee is incompetent as a witness for the administrator, on the ground of interest.—*Walker v. Walker*, 34 Ala. 469; *McLemore v. Nuckolls*, at the present term. The witness in this case was incompetent, unless his incompetency was removed. To restore the competency of the witness, the plaintiff proved, that the witness had made a transfer to two of his co-distributees, of his interest in the slaves in controversy, and the hire of them. It is well established, that a release by the distributee, of his entire interest in the estate, would have removed the objection.—*Robinson v. Tipton*, *supra*; *Gray v. Gray*, 22 Ala. 233; *Herndon v. Givens*, 19 Ala. 313; *Johnson v. Culbreath*, *ib.* 348; *Clealand v. Huey*, 18 *ib.* 343. But we think it is equally clear, both upon principle and authority, that a mere transfer of the distributee's interest in the subject-matter of the particular suit will not have that effect. Notwithstanding such a transfer, the witness is interested in the remainder of the estate, in swelling the fund for the payment of debts, and in avoiding the imposition of costs upon the administrator, whereby the assets for distribution will be diminished. The precise question was decided by this court in *Abercrombie v. Hall*, (6 Ala. 657,) adversely to the competency of the witness. See, also, *Maury v. Mason*, 8 Porter, 211.

[3.] As the objection to the competency of the witness last noticed may be removed upon a future trial, it is necessary for us to notice another objection. The witness is one of the obligors in a bond given under section 1691 of the Code, conditioned to pay the fees and allowances

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made by the probate court on the administration, "if the property of the estate is insufficient therefor." The liability upon this bond is contingent upon the facts, that there are fees, and that allowances are made by the court, and that "the property of the estate is insufficient therefor." It is not a bond for the indemnity of the administrator against the costs of the suit; and the question here is not at all analogous to that which was decided in *Harris v. Plant*, (31 Ala. 639,) as to the competency of one bound to indemnify the party who offers him. The proceedings in this case are, as to the obligors in the bond, *res inter alios acta*. We can not perceive how the judgment could be evidence for them in a suit upon the bond, except in the same sense in which it would be evidence as to all the world, to prove the fact that such a judgment was rendered. We decide, therefore, that the witness, under section 2302 of the Code, was not incompetent, in consequence of his being an obligor on the bond above named.

Reversed and remanded.

MEMPHIS & CHARLESTON RAILROAD COMPANY vs. BIBB.

[ACTION AGAINST RAILROAD COMPANY, TO RECOVER VALUE OF HORSES
KILLED BY LOCOMOTIVE.]

1. *Objection to interrogatory to witness; when made.*—When a deposition is taken without filing interrogatories, an objection to a question, on the ground that it is leading, must be made at the examination of the witness, and comes too late when made for the first time at the trial.
2. *Statutory liability of railroad company; general charge on evidence.*—In an action against a railroad company, to recover the value of horses run over and killed by the defendant's engines and cars, if the evidence simply shows that the horses were run over and killed by a train of cars, and that the engineer in charge of the train

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failed, at the time the accident occurred, to comply with the requisitions of the statute as to blowing the whistle, ringing the bell, reversing the engine, &c., (Session Acts 1857-58, p. 15,) the court is not authorized to charge the jury, that, if they believe the evidence, they must find for the plaintiff: such a charge is an invasion of the province of the jury, who alone could infer from the evidence that the damage was caused by the engineer's neglect of duty.

APPEAL from the Circuit Court of Jackson.

Tried before the Hon. S. D. HALE.

THIS action was brought by A. S. Bibb, against the appellant, a corporation chartered by an act of the legislature of this State, to recover the value of two horses, which were run over and killed by a train of cars belonging to the defendant; and was commenced on the 6th November, 1859. No pleas appear in the record. "When the cause was called for trial," as the bill of exceptions states, "the defendant moved the court to suppress the second interrogatory, with the answer thereto, contained in the deposition of the witness Rigney, because said interrogatory is leading." The deposition of this witness was taken without filing interrogatories; but the commissioner by whom it was taken wrote down the questions which were asked, with the answers thereto. The court overruled the motion, and the defendant excepted.

The witness Rigney testified, that he was a passenger on the train of cars by which the plaintiff's horses were killed; that his attention was attracted by the continuous blowing of the whistle, and, on looking out of the window, he saw the horses on the railroad track, running at full speed, and apparently much frightened; that the cars were moving with their usual velocity, were not more than fifty yards behind the horses, and were gaining on them; that the horses, when he first saw them, were about one hundred and fifty yards distant from the railroad bridge across Paint Rock river, and were running towards the bridge; that they were overtaken by the cars just be-

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fore reaching the bridge, were run over and killed; and that the speed of the cars was not checked until they were very near the bridge, and not in time to save the horses. It was proved by the plaintiff, that the railroad track was crossed by the public road leading from Huntsville to Bellefonte, at a point which was variously estimated by the witnesses at from four to six hundred yards from the bridge; that the track, at the crossing, was on an embankment about eight feet high, which gradually increased to about twenty-five feet at the bridge, and was an up-grade; and that the engineer, who had charge of the train at the time of the accident, did not blow the whistle, nor ring the bell, before reaching the crossing. The value of the horses was also proved. The above being the substance of all the evidence introduced by the plaintiff, and the defendant introducing no evidence at all, the court charged the jury, "that, if they believed the evidence, they must find for the plaintiff"; to which charge the defendant excepted.

The charge to the jury, and the ruling of the court on the evidence, as above stated, are now assigned as error.

WALKER & BRICKELL, for appellant.

ROBINSON & JONES, *contra*.

STONE, J.—[July 18, 1861.]—The objection to the form of the interrogatory, if there be any thing in it, came too late. It should have been made at the examination of the witness; for, to hold otherwise, would license parties to experiment, and greatly hinder the ascertainment of truth.—*Kyle v. Bostick*, 10 Ala. 589; *Sayre v. Durwood*, 35 Ala. 251; *Towns v. Alford*, 2 Ala. 378; 3 Bin. 130; 10 S. & R. 63.

[2.] The act "to define and regulate the liability of railroad companies," approved February 9th, 1852, which was construed in *Nashville & Chattanooga Railroad Co. v. Peacock*, (25 Ala. 230,) was materially modified, and some of its provisions repealed, by the later statute, of the same title, approved February 6th, 1858.—See Session

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Acts of 1851-2, p. 45; and of 1857-8, p. 15. The later statute was of force when the plaintiff in the present suit sustained the injury of which he complains.

The act of 1858, after declaring that it is "the duty of the engineer, or other person having control of the running of a locomotive on any railroad in this State, to blow the whistle, or ring the bell," and to apply the brakes, and reverse the engine in certain cases, employs the following language: "That all railroad companies, in whose employment said engineers are at the time of any accident occasioned by failure to comply with the provisions of the first section of this act, shall be liable for all damage done to persons, stock, or other property, on account of said failure to comply with the requirements of this act, or on account of any negligence whatever on the part of the railroad company or its agents, and in no other case."

The testimony in this case tends to show, that the engineer failed to comply with the provisions of the first section of the act of 1858; and to this extent, there does not seem to have been any conflict in the testimony. But there was no witness who testified, or probably could testify, that the accident complained of was occasioned by the engineer's omission of duty. Before it could be affirmed that Mr. Bibb had lost his horses on account of the engineer's failure to comply with the duties enjoined on him by the statute, it was necessary that some other fact should be inferred from those of which proof was made. It is the province of the jury to draw inferences of fact; but the court can draw no such conclusions, except the case be within the operation of some legal presumption. See *Br. Bank v. Crocheron*, 5 Ala. 250; *Ward v. State*, at the last term; *Bliss v. Anderson*, 31 Ala. Rep. 612. The charge given on the effect of the evidence, if believed, invaded the province of the jury.

This case is not affected by the act of the late extra session of the legislature.—Pamphlet Acts, 37.

Reversed and remanded.

R. W. WALKER, J., not sitting.

HUNT'S EXECUTOR *vs.* HALL.

[ACTION ON PROMISSORY NOTE, BY ASSIGNEE AGAINST MAKER.]

1. *Conflict of laws as to rate of interest.*—A promissory note, made in this State, but payable in New Orleans, bears interest according to the laws of Louisiana, unless a different rate is specified in the note itself.
2. *Alteration of written, by subsequent verbal contract; variance.*—The maker and holder of a promissory note may, by subsequent verbal agreement, founded on sufficient consideration, change the rate of interest which it bears; yet the holder cannot, in a suit on the note itself, recover on such modified contract.

APPEAL from the Circuit Court of Mobile.

Tried before the Hon. C. W. RAPIER.

THIS action was brought by the executrix of Thomas F. Hunt, deceased, against John Hall, Joseph Hall and Gerald B. Hall; was founded on the defendants' promissory note for \$2,000, dated Mobile, March 11th, 1850, payable to John Hunt or order, in the city of New Orleans, with interest from date, and assigned by the personal representative of said John Hunt to the plaintiff's testator; and was commenced on the 23d March, 1859. The defendants pleaded the general issue, and payment. On the trial, as the judgment entry shows, the plaintiff read in evidence the note which was the foundation of the suit, with the several credits endorsed, and the deposition of one Walker. The credits endorsed on the note were the following: "New Orleans, March 6, 1851, \$160, interest on this note to the 11th inst."; "New Orleans, March 10, 1852, \$160, for one year's interest on this note"; "on account of principal and interest of this note, \$1,500, Dec. 8, 1858"; "on account of principal and interest, \$1,027 50, April 15, 1859." The last endorsement was signed by the plaintiff's attorney; the others, as Walker testified, were in the handwriting of the personal repre-

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representative of John Hunt. Walker testified, also, to facts tending to show that, by the terms of the contract between the payee and makers, the note was to bear eight per cent. interest; and that, by subsequent agreement between himself, as the collecting attorney of the plaintiff, and one of the defendants, the latter expressly promised to pay eight per cent. interest, in consideration of his forbearance to sue until a specified day, which had passed before the commencement of the suit. It was admitted, that the legal rate of interest in Louisiana was five per cent. This being all the evidence introduced by the plaintiff, the defendants demurred to it; and the court thereupon rendered judgment for the plaintiff, for one cent damages, besides costs; holding, that the defendants were indebted to the plaintiff at the commencement of the suit, but had paid the sum due. The plaintiff appeals from this judgment, and here assigns the *actus error*.

W. C. EASTON, for appellant.—The judgment of the court below is founded on the erroneous assumption, that the note carried only five per cent. interest, and was therefore fully paid by the credits endorsed on it. It has been decided in Louisiana, that if the rate of interest specified in a contract be according to the law of the place where the contract was made, although that rate may be greater than is allowed by the law of the place where payment is to be made, the courts of the latter place will enforce the payment of the specified rate, as a part of the substance of the contract.—*Dassau v. Humphreys*, 20 La. 11. The same doctrine prevails in New York and Vermont; is said by Chancellor Kent to have much to recommend it, for reasonableness, convenience, and certainty; is fully sustained by Judge Parsons, and is cited with approbation by this court, in *Hanrick v. Andrews*, 9 Porter, 80.—See *Chapman v. Robinson*, 6 Paige, 627; *Peck v. Mayo*, 14 Vermont, 38; 2 Kent's Com. 460, note; Parsons on Contracts, 96, note. The rate of interest not being expressed on the face of the note, Walker's

testimony was admissible to prove it.—*West v. Kelly*, 19 Ala. 358; *Hanrick v. Andrews*, 9 Porter, 85; 31 Ala. 721; 1 Greenl. Ev. §§ 286, 288.

CHAMBERLAIN & HALL, contra.—The note being payable in New Orleans, the rate of interest is to be determined by the law of Louisiana.—*Dickinson v. Branch Bank*, 12 Ala. 54; *Story on Conflict of Laws*, (4th ed.) § 291.

R. W. WALKER, J.—[July 9, 1861.]—The note was made payable in Louisiana, and, being silent in respect to the rate of interest, must bear interest according to the law of that State.—*Dickinson v. Branch Bank*, 12 Ala. 54; *Story on Conflict of Laws*, § 291; *Scotfield v. Day*, 20 Johns. 102; *Peck v. Mayo*, 14 Vermont, 83. It was an admitted fact in the case, that the legal rate of interest in Louisiana is five per cent. It is clear, therefore, that if we look alone to the note itself, in connection with the admitted law of Louisiana, which is silently incorporated into it as one of its terms, the defendant was only bound to pay interest at the rate of five per cent.; and on that hypothesis, the payments proved satisfied the note.

[2.] It is true, however, that although the legal effect of the note was a promise to pay only five per cent. interest; still it was in the power of the parties to modify the written contract, in this respect, by a subsequent verbal agreement, founded on sufficient consideration.—*Smith v. Garth*, 32 Ala. 378; *Stoudenmeier v. Williamson*, 29 Ala. 569. And under a complaint counting on the original contract as modified by the subsequent parol agreement, the plaintiff would be entitled to recover the rate of interest stipulated by such agreement. But, in a suit upon the note itself, it is not allowable to prove a subsequent change of its terms, and recover upon the contract as thus modified. That would be, to allege one contract, and recover upon another; which the law will not tolerate.—*See Tayler v. Pope*, 8 Ala. 190.

While, therefore, it may be admitted, that there was

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evidence tending to show a subsequent parole agreement, whereby the defendant bound himself to pay interest at the rate of eight per cent.; yet, as the only count in the complaint was upon the note itself, such proof could be of no avail to the plaintiff. Nor would it help the plaintiff, to show that the defendant had, at different times, paid interest on the note at the rate of eight per cent. That fact, if established, could not, of itself, operate to change the legal effect of the note; and even if it did, it would not avail the plaintiff in this suit, who can only recover upon the contract alleged, according to which, as we have seen, the rate of interest to be paid was five per cent.

Judgment affirmed.

EX PARTE HILL, IN RE WILLIS, JOHNSON, AND REYNOLDS *vs.* CONFEDERATE STATES.

[APPLICATION FOR PROHIBITION TO PROBATE JUDGE.]

1. *Jurisdiction of State courts to discharge enrolled conscript from custody of Confederate States officer.*—The courts and judicial officers of the State have no jurisdiction, on *habeas corpus*, to discharge from the custody of an enrolling officer of the Confederate States, on the ground of physical incapacity for military service, persons who have been enrolled as conscripts under the several acts of congress.
2. *When prohibition lies.*—Where a probate judge has granted the writ of *habeas corpus* to an enrolled conscript, whose petition for the writ shows on its face that said judge has no jurisdiction to inquire into the validity of his enrollment, a prohibition will be awarded by the supreme court, without a previous application to the circuit court, enjoining further proceedings by the probate judge; and the application for the writ may be made by the enrolling officer who has the custody of the conscript.
3. *Constitutionality of conscript laws.*—The several acts of congress, commonly called the "conscript laws," (C. S. Statutes at Large of 1st

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Congress, 1st session, p. 39; 1st 2d session, p. 61,) are constitutional. (Per Stone, J.)

APPLICATION by L. H. Hill, an officer in the provisional army of the Confederate States, and the enrolling officer of the district including the county of Montgomery, for writs of prohibition, to be directed to the probate judge of said county, enjoining and restraining him from further proceedings in the matter of the petitions of Asa J. Willis, E. P. Johnson, and Calvin Reynolds, respectively, for the writ of *habeas corpus*, by which said petitioners sought to obtain their discharge from the custody of said enrolling officers.

The application was made on a regular motion day, during the January-term, 1863; present, Hon. A. J. WALKER, C. J., and STONE, J. The opinion of Chief-Justice WALKER was pronounced on the 4th March, 1863, and an opinion was pronounced by Justice STONE a few days afterwards; but the latter opinion was subsequently withdrawn, and that herewith published was substituted in its stead.

The case was argued at the bar, by P. T. SAYRE, on behalf of the Confederate States, and by S. F. RICE and JNO. A. ELMORE, with whom was A. B. CLITHEBALL, for the petitioners in the court below. No brief or memorandum of their arguments has come to the hands of the Reporter.

A. J. WALKER, C. J.—[March 4th, 1863.]—Three persons, who were taken and detained in custody under the conscript law by the enrolling officer, severally petitioned the probate judge for writs of *habeas corpus*, predicated their prayers for a discharge upon the ground of exemption from conscription on account of physical disability; and the writs were awarded by that officer. The enrolling officer, contending that the judicial tribunals of the State have no jurisdiction over the matter of his detention of those persons as conscripts, now applies to this court for writs of prohibition. Thus the duty devolves upon this court, of deciding whether a State tri-

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hunal has authority to discharge one who has been taken and is detained by the enrolling officer as a conscript, upon the ground of his exemption for the reasons above stated.

The first section of the act of congress, approved April 16th, 1862, authorizes the president to call out and place in the service of the Confederate States men between the ages of eighteen and thirty-five years, who were not legally exempted from military service. The amendatory act of the 27th September, 1862, in language similar to that employed in the original law, extends the authority to men between the ages of thirty-five and forty-five; and requires the president, if he should not call out all the persons between the specified ages, to discriminate, by limiting his call to persons of some particular age under forty-five. By an act, approved 21st April, 1862, certain descriptions of persons were exempted from enrollment for service in the armies of the Confederate States. That act was repealed by one adopted on the 11th October, 1862, which exempts "from military service in the armies of the Confederate States" various classes of persons therein described.

The two acts of 16th April and 27th September impose upon the authority to conscribe a restriction to persons not legally exempted. The persons exempt are not described by name, but by classes, defined by reference to bodily or mental incapacity, to the incumbency of certain offices, the practice of certain useful arts, the profession of some specified religious creeds, and other distinguishing peculiarities. As the authority to conscribe does not extend to the individuals who compose those classes, it can only be exercised by ascertaining the persons to whom the peculiarities distinguishing the different classes pertain. The ascertainment of the legal subjects of conscription is an unavoidable step in the proceeding. Inquiry and decision, upon this point, are necessarily involved in the exercise of the president's power to conscribe all within the prescribed ages, "who are not legally exempted from military service."

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The selection from the community at large of the subjects of conscription, involving inquiry and decision as to the *status* of every man, was obviously susceptible of accomplishment by the executive department of the government, only through the agency of officers, clothed with the requisite authority. Congress therefore has authorized the appointment of such officers. By the third section of the act of 16th April, 1862, the president is empowered to appoint officers, charged with the duty of enrolling conscripts, "*in accordance with rules and regulations to be prescribed by him.*" A later act, approved 8th October, 1862, directs, that enrollments shall be made *under instructions from the war department*, and reported by the enrolling officer. Furthermore, an act, approved October 11th, 1862, authorizes the assignment of one or more surgeons to the duty of examining those enrolled; and declares, that the decision of such surgeon or surgeons, "*under regulations to be established by the secretary of war*", as to physical and mental capacity, *shall be final*.

The employment of appropriate officers to execute the conscript law, is thus clearly authorized. Every act of conscription by such officers must be done pursuant to a decision based upon an inquiry, in which the hearing and weighing of evidence must often, if not always, be necessary. Without an inquiry and judgment as to the liability to conscription, no enrollment could be made, because it could not otherwise be determined who were subject to conscription. This authority to inquire and decide is not, however, left to implication from the nature of the act. There is an express authority to decide upon the question of exemption on account of mental or physical incapacity, and the decision of the tribunal designated is made final. The existence of such authority is clearly indicated in the phraseology of the law, declaring, that "all persons who *shall be held unfit* for military service in the field, by reason of bodily or mental incapacity, under the rules to be prescribed by the secretary of war," shall be exempt. The *holding* or deciding persons to be unfit for military service, under rules prescribed

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by the secretary of war, must be by the officers appointed to execute the law. The authority to hear evidence and decide, is a plain inference from the provision in the act of 11th October, 1862, that the claim of certain classes of artisans is to be supported by affidavit, which shall only be *prima-facie* evidence of the facts stated. Furthermore, the general idea, that the power of investigation and decision is a part of the authority to be exercised by the respective officers, is very clearly brought to view in the clause of the same act, which requires the secretary of war, upon evidence, to judge whether the exempted artisans have, by their conduct, forfeited the privilege. It must be noted, too, that the duties of the officers are to be discharged under rules and regulations to be prescribed by the secretary of war. Surely, these rules and regulations are not contemplated to be merely the guides of the subordinate officers, in performing the acts of writing down the names of the conscripts, and taking charge of them. They were destined to control and direct them in the higher, more important, and more difficult office of inquiring and judging as to the liability to conscription. The execution of the law is utterly impracticable, if there be no authority to ascertain and judge who are the legal subjects of conscription. With the utmost confidence, I assert the proposition, that the officers employed in the execution of the law are clothed with authority to judge what persons fall within its operation. The exercise of this authority is an official duty, to be performed under the guidance of rules prescribed by the secretary of war.

A State judge, in discharging one taken as a conscript upon the ground that he was not legally liable to conscription, would supervise and control an officer of the Confederate States, in the performance of an official duty, and in the exercise of a legal authority. He would, furthermore, annul the decision which such officer was authorized to make, and abrogate the enrollment based upon that decision. The decision of the question of amenability to conscription is within the scope of the authority exercised. An incorrect decision would be an

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erroneous exercise of a subsisting authority—not a mere usurpation. The officer is perfectly within the limit of his authority, when he investigates and decides; and, though he may err, he is not an usurper. Neither the absolute invalidity of the conscription, nor a liability in trespass, would result from an incorrect decision.—*Duckworth v. Johnson*, 7 Ala. 578; *Sayacool v. Boughton*, 5 Wend. 170; *Easton v. Calender*, 11 *ib.* 90.

The principle is illustrated in the case of a justice, erring the exercise of his authority to commit offenders; and of assessors, who incorrectly decide that a given person belongs to a class liable to be taxed. The levy of a *fiery facias* by a marshal of the Confederate States, upon property not belonging to the defendant, does not present an analogous question. He is simply authorized by the process to do a particular thing. He is not called upon by the law to decide anything. He has none of the attributes of a tribunal armed with authority to investigate and decide questions. His judgment, of course, he exercises, in determining whether the property upon which he levies belongs to the defendant; but, upon a principle of public policy, he decides at his own peril. The exercise of his judgment is for his own protection, and not by authority of law. His process authorizes him to levy upon the defendant's property—not to adjudge the question of the title to property. It neither requires him to construe a law, nor to decide upon evidence as to the cases that come within its operation. The law under which he acts, and which governs him, unlike that under which the enrolling officer acts, has not deemed it necessary to bestow authority for an investigation and quasi-judicial decision, preliminary to his action; but, in requiring him to act at his own personal peril, has expressly repudiated such an idea. No act of congress prescribing a marshal's authority, nor any construction thereof, can be drawn in question in a suit against him for the levy of process against one, upon the property of another. The simple inquiry, in such a suit, would be, whether the particular chattel, under the general law governing prop-

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erty, belonged to the one person or the other; while at every step in the cases now before us, the court must expound the act of congress marking out the authority of the officer. The decisions, therefore, as to the power of the State courts over the United States marshals, erring in the execution of their process, have no bearing upon the question before us. The same distinction applies to an arrest of one person, by virtue of process against another.—*Bruen v. Ogden*, 6 Hals. 370; *Dunn v. Vail*, 7 Mar. La. 416; *Slocum v. Mayberry*, 2 Wheaton, 1.

The officer charged with the execution of the conscript law, not only has authority to investigate and decide, but he is required to do so according to regulations prescribed by the secretary of war. The question of these cases, then, is narrowed down to this: can a State judge, by writ of *habeas corpus*, supervise, control, and annul the act of officers of the Confederate States, done in the exercise of authority given by the law of that government, and required to be done under regulations prescribed by the secretary of war?

It is proper to approach the interesting question above stated, by an observation in reference to the relation existing between the government of the Confederacy and the government of the several States which compose it. The government of the Confederacy possesses the powers delegated by the constitution; and the States retain their original powers, except so far as they may be affected by the grants or prohibitions of the constitution of the Confederate States. While the Confederate government exists by virtue of delegated authority, its powers, within their appropriate boundary, are not subordinate to those of the States. On the contrary, it is expressly declared in the constitution, that the constitution, and the laws of the Confederate States made in pursuance thereof, and all treaties made under the authority of the Confederate States, shall be the supreme law of the land. The authority of all governments must be exercised, and must reach the subjects of its operation, through the agency of officers. The officers of the Confederate States, and of

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the several States, must exercise their functions, and apply the authority of their respective governments, within the same territorial area. It is the clearest deduction of reason, that the officers of neither of these distinct powers, operating within the same territorial limits, and performing proper functions, can be subordinated to the other, except as authorized by the constitution, without detriment to the harmonious working of our complicated system, and peril to the rights and benefits which that system was designed to secure.

The analogy (in all respects which concern our subject) between our government and that of the United States enables me to draw from the history of the past an illustration of the idea which I am striving to develop. The fugitive-slave law was passed to protect and maintain a clear constitutional right of a class of citizens in the United States, whom the fluctuations of time had localized in less than a moiety of the States. In most of the other States, an antagonism of sentiment to that right gradually intensified into fanaticism, and extended to the persons to whom the right appertained. A right of subordinating the authority of the officers deputed to execute that law, to the control of local State tribunals, infected by the feeling prevalent in those States, was asserted and maintained. In many localities, the execution of the law was, by this means, prevented; and the just claim of the people of the slaveholding States, to the maintenance of a constitutional right, was defeated. The powers of the Confederate government are given to it for the benefit and protection of all the people in all the States; and the historic lesson teaches us, that the execution of the laws, passed by virtue of those powers, can not be safely left to the control of local tribunals. The absence of the danger, under our system, can only be argued by arrogating to ourselves a freedom from the frailties of human nature.

The supreme court of the United States, faithful to the constitution, while every other branch of the government seemed to conspire its overthrow, through its ven-

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erable and illustrious chief-justice, announced an opinion upon the assumption by the court of Wisconsin of the authority to thwart the execution of the fugitive-slave law in that State. The case was *Ableman v. Booth*, and the *United States v. Booth*, reported in 21 Howard, 506. The entire opinion seems to have had the approval of each one of the nine judges composing the court; which was rarely the case, where questions of constitutional law were presented. In that opinion it is said: "The powers of the general government, and of the State, although both exist, and are exercised, within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge, or a State court, as if the line of division was traced by landmarks and monuments visible to the eye." In this extract, and in other parts of the opinion, the proposition is maintained, that neither government can pass the line of division between their respective powers; and the court further asserts, that the United States marshal, after legally showing his authority to the State tribunal, would be bound to resist its further interference. The practical effect of the law, as declared in that case, is, that a State court, or officer, has no right of control over the conduct of the officers of the general government, in the exercise of an authority bestowed by its law.

Nor was this principle, when announced in the case above named, at all new in the jurisprudence of the United States. I avail myself of Chancellor Kent's condensation of the decisions upon that subject, and of the authority of his great name, in behalf of my argument, in the following extract from his *Commentaries*:—
"No State can control the exercise of any authority under the Federal government. The State legislatures can not annul the judgments, nor determine the extent of the jurisdiction, of the courts of the Union. This was attempted by the legislature of Pennsylvania, and de-

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clared to be inoperative and void by the supreme court of the United States, in the case of the United States v. Peters, 5 Cranch, 115. * * * * It has also been adjudged, that no State court has authority or jurisdiction to enjoin a judgment of the circuit court of the United States, or to stay proceedings under it. This was attempted by a State court in Kentucky, and declared to be of no validity by the supreme court of the United States, in McKim v. Voorhies, 7 Cranch, 279. No State tribunal can interfere with seizures of property, made by revenue officers under the laws of the United States; nor interrupt, by process of replevin, injunction, or otherwise, the exercise of the authority of the Federal officers; and any intervention of State authority, for that purpose, is unlawful. This was so declared by the supreme court, in Slocum v. Mayberry, 2 Wheat. 1. Nor can a State court issue a *mandamus* to an officer of the United States. This decision was made in the case of McClung v. Silliman, 6 Wheat. 598; and it arose in consequence of the supreme court in Ohio sustaining a jurisdiction over the register of the land-office of the United States, in respect to his ministerial acts as register, and claiming a right to award a *mandamus* to that officer, to compel him to issue a final certificate of purchase. The principle declared by the supreme court was, that the official conduct of an officer of the government of the United States can only be controlled by the power that created him. If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal courts. But, if there be no jurisdiction in the instance in which it is asserted—as if a marshal of the United States, under an execution in favor of the United States, against A, should seize the person or property of B—then the State courts have jurisdiction to protect the person and property so illegally invaded; and it is to be observed, that the jurisdiction of the State court in Rhode Island was admitted by the supreme court of the United States, in

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Slocum v. Mayberry, upon that very ground."—1 Kent's Com. 409–10–11. See, also, *McNutt v. Bland*, 2 How. 17.

As the officers authorized to execute the conscript law, have jurisdiction to examine evidence and decide upon the question of amenability to conscription, the authority of Chancellor Kent, as exhibited in the foregoing extract, is wholly opposed to the jurisdiction claimed for the probate judge in these cases. Judge McLean, of the supreme court of the United States, holding a circuit court in Indiana, in a charge to a jury trying a case wherein a master sought to recover damages for the taking of his slaves from his custody under a *habeas corpus* issued by a Michigan court, held, that a State tribunal could not release from custody persons held under the authority of the United States, and procured from the jury a verdict for the full measure of the master's damages.—*Norris v. Newton*, 6 McLean, 92. Judge Nelson, of the supreme court of the United States, in a charge to the grand jury, maintained the same doctrine in 1851.—*Hurd on Habeas Corpus*, 198. Judge Cheves, of South Carolina, in a learned opinion, reported in the 12th vol. Niles' Register, declined to take jurisdiction over the matter of the discharge of one imprisoned under process issued by the authority of the United States; and the recorder at Charleston has recently followed the principle of that decision, in refusing to interfere under a writ of *habeas corpus* with the detention in the army of an infant only sixteen years of age; maintaining, that the precedent set by Judge Cheves has since been acquiesced in as a correct exposition of the law in South Carolina.—*Ex parte Rhodes*, 12 Niles' R. 264; In the matter of Benjamin Sauls, Charleston Courier of 20th October, 1862. In the State of New York, speaking for himself, and not as the organ of the court, Chancellor Kent laid down the principle more recently asserted in the case of *Ableman v. Booth*.—*Ex parte Ferguson*, 9 Johns. 239. It appears, however, that this opinion never controlled the action of the New York courts; for they seem to have since exercised the controverted jurisdic-

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diction.—*Ex parte Stacy*, 10 Johns. 328; *Carlton's case*, 7 Cow. 471; *United States v. Wynnall*, 5 Hill, 16.

There are several decisions by State courts, which hold that they have the power to discharge persons improperly imprisoned under the authority of the United States, or even under its process.—*Almeida's case*, 12 Niles' Reg. 415; *Lockington's case*, 5 Hall's Law Journal, 301; *Commonwealth v. Fox*, 7 Barr, 336; *State v. Dimick*, 12 N. H. 194; *Commonwealth v. Harrison*, 11 Mass. 68; *The State v. Brearly*, 2 South. 555. Several of these cases pertain to the question of the discharge of soldiers, enlisted during their minority, by contracts which the act of congress declared void. I will not pause to inquire, whether they are not distinguishable from these cases; for, if analogous, I am not willing to follow them. They were decided before the supreme court of the United States made its decision in *Ableman v. Booth*, herein before noticed. I can not reconcile with sound principle, or real expediency, the proposition, that an officer of the Confederacy, when engaged in the execution of an act of congress, and acting within the sphere of his authority, can be subject to the control of the judicial tribunals of the States. It is natural that the judicial mind should approach a question which concerns the liberty of the citizen, with a profounder solicitude, and a more sensitive delicacy; nevertheless, the principle is the same, when the authority of the government touches the property of the citizen, as when it touches his person. And the same doctrine which gives to the State tribunals a power to supervise such official action as concerns the liberty of the citizen, must subject to the arbitrament of the humblest State officer, clothed with judicial authority, the regularity and legality of the acts of all the officers of the government, whose functions reach the property or money of the people. The power of taxation, of collecting the customs, of regulating foreign commerce and commerce between the States, of restoring fugitive slaves, of raising and supporting armies, and all the other powers of government, would be exercised by its officers under its au-

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thority, subject to the controlling interference of the local tribunals, within the jurisdiction of which the power should chance to be in process of execution. Authority conferred by all the States, to be exercised by a government, in the administration of which all the people and all the States, directly or indirectly, participate, would be admeasured and regulated by the tribunals of particular localities. A law for the raising of revenue, or of armies, might receive the acquiescence and prompt obedience of a majority of the States; while a minority, by aid of their courts, utterly thwarted its execution within their limits. Thus a burden, designed to be common, would become partial. And a clash of authority between the States and the Confederate government would lead to disastrous results.

The officers, executing the law of conscription, are required to act under rules given them from the war department. Guided by those rules, the officers may attain a conclusion altogether variant from that which a State judge, either uninformed as to those rules, or not recognizing their obligation upon him, would attain. I presume, that those who argue the subordination of the Confederate officers to the State tribunals, would repudiate the idea of the government of those tribunals by regulations of the war department; for the argument which maintains a supervisory authority over the subordinate officer would as well apply to his superior. Are we, then, to have an officer, obligated by rules and regulations from the war department, subject to the supervision and control of another, who is not bound to an observance of them? Are we to have an officer convicted as a usurper, and made amenable to damages as a trespasser, who has acted correctly according to regulations which govern him, but who is to be tried by a tribunal not recognizing them? These inquiries suggest a very conclusive argument against the assumption of State authority in these cases.

I do not controvert the right of State courts to interpret the constitution, treaties, and laws of the Confederate States, and treat as nullities all laws infringing the

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constitution, in cases over which they have jurisdiction. The point of my argument is, that these cases are without the jurisdiction of the probate judge, and he can not adjudge any thing concerning the rights of the parties.

Nor do I controvert the general proposition, that the courts of the States have concurrent jurisdiction over all subjects cognizable in the courts of the Confederate States, when it is not otherwise provided by law. But I think, that the general rule must be taken with the exception of those cases in which the execution of the laws of the Confederate States by its officers is to be supervised and controlled.

I am not unmindful of the argument *ad inconvenienti*, which has been made. It may be, that access to a judicial officer of the Confederate States would, at present, be inconvenient; but if so, it is an evil which could easily be avoided, by an act of congress increasing the number of officers, and adjusting their locations with a view to the convenience of the people. The postponement of this duty by congress can not justify us in the abandonment of a principle, or in the setting of a pernicious precedent. Moreover, it must be observed, that the government of the Confederate States has not been so unmindful of the liberty of the citizen, as to leave it to the irrevocable decision of the subordinate enrolling officer. On the contrary, an appeal to the commandant of conscripts, and thence to the secretary of war, is provided by the regulations prescribed for the officers employed in the execution of the law; and I presume the appeal could be extended to the president himself. I am not prepared to admit, that this succession of officers does not afford a reasonable assurance of the maintenance of justice, right and law. At least, no one can justly complain that no remedy against an erroneous decision is provided, until he has tested those which the government extends to him. And besides all this, a resort may be had to the judge of the court of the Confederate States. The government of the Confederate States was organized by the States, and its laws have been passed and its officers selected, directly

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or indirectly, by the States and the people; and it should have the generous confidence and the manly support of the country, in the present struggle for independence and liberty.

If it be true that, at common law, the facts alleged in the return to a *habeas corpus* can not be contested; and if no remedy for that vice in the law had been provided, the blame would be due to the State government. But in fact, in this State, and in all the other States of the Confederacy, as far as our examination has been extended, there is an express provision for the contestation of the return.—Code, § 3732. If, therefore, a false return should be made, that the petitioner was held by a duly appointed officer by competent authority, it would be the duty of the probate judge to hear a contestation of the return, and not to remand the prisoner if the return was false. In these cases, the petitions themselves, when properly construed, show the want of jurisdiction in the probate judge; and it was his duty to have rejected them *in limine*.—*Ex parte Tobias Watkins*, 3 Peters, 291.

[2.] The cases of *Ex parte Burnett*, 30 Ala. 461, and *Ex parte Smith*, 28 *ib.*, are deemed conclusive authority in favor of the right to apply to this court for a prohibition, without a previous application to an inferior court. The probate judge, in granting the *habeas corpus* upon the petitions, exercised an authority that did not belong to him; and there is no other remedy than the writ of prohibition. It is clear, therefore, that that writ is the proper remedy. *Ex parte Morgan Smith*, 23 Ala. 94; *Ex parte Walker*, 25 Ala. 81; *Ex parte Greene & Graham*, 29 Ala. 52. The petitioner for the prohibition is the party whose custody of the conscript is interfered with, and we think he may make this application.

If we have the facts of these cases correctly presented to us in the petitions, the foregoing opinion is decisive of them. But, as the facts do not appear of record, we deem it the safer course to issue a rule *nisi* to the probate judge. 8 Blacks. Com. 113-14.

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STONE, J.—Three several petitions for *habeas corpus* were presented to the judge of probate of Montgomery county, by the petitioners, Asa J. Willis, Edward P. Johnson, and Calvin Reynolds; each alleging that he was held a prisoner in custody by the enrolling officer, under the claim and pretense that he, the petitioner, was liable to do military duty; while each petitioner averred in his petition, that he was advised and believed he was exempt from military service in the field, by reason of physical incapacity; each petition setting forth the particular disease which, it was alleged, operated the exemption. In neither of said petitions is it averred, that the petitioner has been examined by an *examining surgeon*, or *board of examination*; nor is it averred that he has been held *unfit for military service in the field, by reason of bodily incapacity or imbecility*. On the contrary, it is obvious from the face of each petition, that the applicant seeks enlargement, not on the ground that *he has been held unfit for military service*, but that he *is in fact unfit to perform such service*, by reason of bodily incapacity; which fact he seeks to establish by evidence on the trial of the *habeas corpus*.

The judge of probate issued writs of *habeas corpus* in the several cases; and the enrolling officer, denying the jurisdiction of the judge of probate in the premises, prays for writs of prohibition, directed to that officer, commanding him to surcease from the further exercise of such authority. The question is thus presented, has the judge of probate jurisdiction of the cases made by the several petitions? I hold, that he has not; and I shall proceed, as briefly as I can, to state the reasons which lead my mind to this conclusion.

The Confederate government, being engaged in war, has the unquestioned right to call the male residents of the Confederacy into the service. "As war can not be carried on without soldiers, it is evident," says Mr. Vattel, "that whoever has the right of making war, has also naturally that of raising troops."—Page 294. "Every citizen is bound to serve and defend the State as far as he is capable."—*Ib.* "No person is naturally exempt

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from taking up arms in defense of the State, the obligation of every member of society being the same."—*Ib.* Allegiance, or the duty to defend the State when assailed, is correlative to protection. The government owes the latter to the citizen; the citizen, the former to the government.—1 Blacks. Com. 369; case of Isaac Williams, 2 Cranch's Rep. 82, in note.

The acts of congress, known as the "conscript laws," are constitutional. The constitution of the Confederate States (art. 1, sec. 8, sub-divisions 11, 12, 13, 14) confers on congress the power "to declare war," "to raise and support armies," "to provide and maintain a navy," and "to make rules for the government and regulation of the land and naval forces." These are specific grants of power, in language free from ambiguity; and in neither of the clauses quoted, is found a word or syllable, which defines the mode or manner of executing the power. The same clause which gives the power to raise armies, gives also the power to support armies. The two words are coupled together by the copulative conjunction; and if the one power require the agency of State authority for its execution, by every sound canon of construction, the other power must equally require such agency. I go further: All the grants of power in the 8th section of the 1st article of the constitution, (seventeen that are specific, and one general in its terms,) are one continuous sentence, each clause being expressed in phraseology of kindred character; and if congress cannot directly execute the powers enumerated above, neither can that body directly execute the other powers therein granted. Now, when we reflect that, among the enumerated grants found in that section and sentence, are the power "to lay and collect taxes, duties, imposts and excises," "to borrow money on the credit of the Confederate States," "to regulate commerce with foreign nations," "to coin money," "to declare war," &c., surely no one can, with any plausibility, contend, that these several powers can only be exercised through State instrumentality.—*Prigg v. Commonwealth*, 16 Pet. 616.

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The 16th clause of the section of the Confederate constitution which I am considering, contemplates that the *militia*, which constitutes the material out of which armies are to be raised, may be kept in a state of organization and discipline; and, inasmuch as invasions or insurrections may be suddenly precipitated upon us, or the execution of the laws of the Confederate States may be resisted in force, so as to require prompt and vigorous measures for the defense of the country and the welfare of society, congress is also empowered, by the 15th clause, "to provide for calling forth the militia." This is a separate clause, distinct from the authority to raise armies, and was deemed a necessary reserve to meet exigencies, in a country which revolted at the idea of large standing armies, or splendid military establishments in times of peace. The militia, for exigencies; the army, when war has become an established fact.

It being thus shown, as I think, that congress is clothed with power to raise armies by direct means, without calling to its aid State authority, it follows irresistibly, that congress is the sole arbiter of the means and machinery it will adopt for executing this power; with the well known limitation, that the means employed shall be both necessary and proper for carrying into execution the granted power; that is, as I understand this clause, that both qualifying words shall have operation and effect: *necessary* to the full enjoyment of the right; and *proper*—homogeneous and harmonious with our compound system of government. No matter how necessary the proposed means may appear, still, if it antagonize any of the reserved rights of the States or of the people, or militate against any of the principles which underlie our liberties, then it is not proper; and, on the other hand, if the means proposed be in harmony with every principle of our institutions, and be not necessary to the full enjoyment of some power granted to the Confederate government, the employment of such means by that government would be a sheer usurpation. When I speak of incidents to the grants of power to the Confederate government, I

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mean express grants; for there should be no incidents to incidental powers.—See *Federalist*, No. 38.

The magnitude of the war that is being waged against us, renders it necessary that the government put forth its greatest strength for the protection of our liberty and our property. This, I am satisfied, could not be accomplished by any means short of compulsory enrollment; and hence I hold, that the conscription acts are constitutional.

Various officers, agencies, rules and regulations, are necessary and proper instrumentalities in carrying into effect the expressly delegated power "to raise armies." Hence, these means are also constitutional; that is, they are necessary, and are not incompatible with the reserved rights of the States, or of the people. Many of these agencies, trusts and duties, require professional skill and knowledge, which can not be looked for in persons who have not had the advantages of military training and experience; and it was very natural that the government of the Confederate States should take to itself, and to officers of its own appointment, the determination of questions requiring such professional skill.

We have two acts of congress for the conscription of the citizens; one approved April 16th, 1862, (*Statutes at Large*, first session of first Congress, p. 29;) the other approved Sept. 27, 1862, (*Stat. at Large*, second session of first Congress, p. 61.) Each of these statutes authorizes the president to call out, and place in the army, all white men who are residents, between the ages specified, "who are not legally exempted from military service." Neither of them defines what residents, or classes of residents, are exempted from such service; but both statutes leave that subject to be disposed of by after legislation. Hence, every resident white man, within the specified ages, is liable to be called into the military service of the Confederate States, unless it can be shown that he comes within the provisions of the exemption statutes. We have shown above, that no person is naturally exempt from taking up arms in defense of his country; and it

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follows, that the *onus* is on him who claims exemption, to establish his right to it.

Imbecility, or disability, either mental or physical, is, *per se*, no legal exemption from military service in the army of the Confederate States. This results from the fact that exemption is a favor granted,—not a right conceded; and congress has nowhere said that mental or physical imbecility is a valid excuse for the non-performance of military service. In granting this boon, congress had power to prescribe terms and conditions on which it could be claimed; and it did so.

The language of the acts of congress, defining exemptions on account of bodily or mental incapacity, is as follows: "That all persons who shall be held to be unfit for military services, under rules to be prescribed by the secretary of war, shall be, and are hereby, exempted from military service in the armies of the Confederate States." Act approved April 21, 1862, C. S. Stat. at Large, 1st session of 1st Congress, p. 51. The language of the act approved Oct. 11th, 1862, is as follows: "That all persons who shall be held unfit for military service in the field, by reason of bodily or mental incapacity or imbecility, under rules to be prescribed by the secretary of war, are hereby exempted from military service in the armies of the Confederate States."—Stat. at Large, 2nd session, p. 77.

I have thus quoted every word and syllable found in the acts of congress, which confer the right of exemption from military service, on account of mental or physical incapacity. It will be seen that neither mental nor bodily disease is, *per se*, a ground of exemption.

By act of congress, approved Oct. 11th, 1862, (Stat. at Large, 2d session, p. 75,) it is provided, "that there shall be established in each county, parish or district, and in any city in a county, parish or district, in the several States, a place of rendezvous for the persons in said county, district, parish or city, enrolled for military duty in the field, who shall be there examined by one or more surgeons, to be employed by the government, to be

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assigned to that duty by the president, on a day of which ten days notice shall be given by the surgeon, and from day to day next thereafter, until all who shall be in attendance for the purpose of examination, shall have been examined; and the decision of said surgeons, under regulations to be established by the secretary of war, as to the physical and mental capacity of any such person for military duty in the field, shall be final." Section 2.

"There shall be assigned to each congressional district in the several States, three surgeons, who shall constitute a board of examination in such districts, for the purpose specified in the foregoing section, any one or more of whom may act at any place of rendezvous in said district."

Provision had been made for the enrollment of conscripts, under other acts of congress.

Under the acts of congress from which I have given extracts above, the secretary of war has made and published the following rules:

"Questions of bodily and mental incapacity will be decided by surgeons employed for the purpose, by virtue of the act of congress approved on the 11th of October, 1862."

"Persons deemed incapable of bearing arms, shall be reported by the examining surgeon to the board of examination, who shall determine the questions of exemption, and grant certificates thereof. * * * So soon as the examining board shall be organized in any congressional district, and shall enter upon the discharge of their duties, no other mode of examination for persons in that district will be pursued; and the decision of the examining board will be deemed final."

"Applications for exemption must, in all cases, be made to the enrolling officer, from whose decision an appeal may be taken to the commandant of conscripts. The department will not consider the application, until it has been referred by the latter officer."

In the light of these statutes and these rules, I hold, that the petitions brought to view in the present cases

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show no ground which the judge of probate was authorized to inquire into or try. They do not aver that the petitioners had been "held unfit for military service in the field, by reason of bodily or mental incapacity or imbecility," under rules prescribed by the secretary of war. They set forth the grounds on which they severally claim the right to be enlarged; and when those grounds are examined, they are found wholly insufficient. They are as unimportant as the assertion of any other indifferent fact; such, for instance, as that the petitioner was a white man, was the head of a family, &c. A petition, claiming enlargement on a ground so utterly frivolous as those supposed, could scarcely command the serious consideration of any court.

I have shown above, that congress, in granting the privilege of exemption on the ground of mental or physical unsoundness, has reserved to the secretary of war, and to surgeons for whose appointment it makes provision, the right of passing upon the question of unsoundness. In other words, the statute exempts only such persons as are decided by the surgeon, or board of examination appointed by the president, to be incapable of bearing arms. This, I think, was very natural and necessary. It brings the adjudication of this very difficult problem within the control of experts, and saves the public service from delay and detriment, which, in some instances, might result from ignorance or favoritism. It avoids inequality, by providing a stationary and uniform board of examination, whose decisions, we must presume, would be much more likely to be right, than the opinions of any and every practicing physician who might be called to testify. Be this, however, as it may, the acts of congress give to the surgeon, and to the board of examination, the exclusive right to pass on the question of mental or bodily incapacity; and that takes from State courts all right to inquire into the question.—See Federalist, No. 82; 1 Kent's Com. 390, marg.; Houston v. Moore, 5 Wheat. 1; Sturgis v. Crowninshield, 4 Wheat. 198; Prigg v. Commonwealth, 16 Pet. 625; Moore v.

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Houston, 3 S. & R. 179; *Blanchard v. Russell*, 13 Mass. 16; *Livingston v. Van Ingen*, 9 Johns. 507; 2 Story's Com. § 1755-6, and note 2; *Martin v. Hunter*, 1 Wheat. 304; *Ex parte Gist*, 26 Ala. 156.

I take a further step. The acts of congress cited in this opinion, and the instructions framed under their authority, commit the determination of the various questions raised by the petitions for *habeas corpus*, to certain officers and agents of the Confederate government, and declare, in terms, that the decision thus pronounced shall be final. Under these circumstances, the State legislatures have no authority to create a new forum, or clothe it with power to settle or retry the question of mental or physical capacity for military service.—See *Wayman v. Southard*, 10 Wheat. 1; *U. S. Bank v. Halstead*, *ib.* 51. It would be passing strange, if State courts, in the absence of legislation, could perform functions which the legislature can not confer upon them.

Whether Confederate courts have, or can exercise, any greater powers over the question under discussion, is a subject not before me, and I will not decide it.

It may be contended, however, that while the foregoing argument may prove that State courts have no authority to discharge persons from military service, on account of physical disability, *not shown to exist in the manner pointed out by the acts of congress, and the rules issued by the secretary of war*; still, I have failed to establish the proposition, that State courts may not, in such case, issue the writ of *habeas corpus*, and inquire of the legality of the imprisonment.

To this I answer, first, that the petitioners for *habeas corpus*, by placing their claim to enlargement on a fact that is, in law, utterly indifferent and frivolous, fail to show on the face of their petitions that they are illegally restrained of their liberty. The petitions do not contain the averment, common in such cases, that the petitioners are *illegally* restrained of their liberty. The averment is, that they are "prisoners restrained of their liberty;" and they then set forth the ground, to-wit, physical un-

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soundness, on account of which, they aver and say, they are "advised by counsel and believe their imprisonment to be illegal." Hence, there is a want of jurisdiction, in this, that the petitioners show themselves rightfully restrained, yet ask the writ of *habeas corpus*, that the legality of that restraint may be inquired into.

But, secondly: Jurisdiction is *the right to hear and determine a cause*.—United States v. Arredondo, 6 Pet. 691, 709; Sheldon v. Newton, 3 Ohio State Rep. 490, 499. Jurisdiction, says Bouvier in his Law Dictionary, is "a power constitutionally conferred upon a judge or magistrate, to take cognizance of and decide causes according to law, and to carry his sentence into execution." In the case of Rhode Island v. Massachusetts, (12 Pet. 657, 718,) Mr. Justice Baldwin said, "Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit; to adjudicate or exercise any judicial power over them." Now, it seems to me to be clear beyond all question, that the power, or rather the absence of power, in the probate judge, over the subject of complaint brought to view by the several petitions for *habeas corpus*, demonstrates an entire want of jurisdiction in that officer, under each and all the definitions above set forth. The *gravamen* of each petition is, that the petitioner is physically unable to perform military service. Jurisdiction is the right to inquire into the alleged fact of such physical disability. The probate judge has no authority to inquire into, or try that question; therefore, the probate judge has no jurisdiction of the causes made by the several petitions.

If it be contended further, that the judge of probate had jurisdiction, because he had authority to decide, as a judge, that he would not and could not enter upon the trial of the question of physical disability; the argument is just as strong, and no stronger than would be the assertion, that every court which dismisses or repudiates a cause for want of jurisdiction, thereby affirms its jurisdiction, and disproves the truth of its own solemn sentence. It is rarely the case that any court attains the

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conclusion it has not jurisdiction of a given subject, without construing some statute, or announcing some legal or constitutional principle, which deprives it of jurisdiction. In the great case of *Dred Scott v. Sandford*, (19 How. 393,) the supreme court of the United States decided, that neither itself nor the circuit court had jurisdiction of the case made by the plaintiff; still that court enunciated some of the most important principles ever decided on this continent; and was compelled to decide many of them, to reach the conclusion that it had not jurisdiction of the case.

For these reasons, I hold, that the judge of probate has no jurisdiction of the cases made by the several petitions.

In an opinion, recently delivered by the chief-justice of the supreme court of North Carolina, I find that he concurs in denying to the courts power to retry the question of mental or physical incapacity.

When, on a former day, I delivered an opinion in these cases, I limited the operation of my remarks to cases which are in principle like the present, because there had not then been a conference between all the members of the court; and as I felt inclined to differ from the chief-justice, on some propositions contained in his opinion, I purposely withheld my views until a full consultation with our absent brother could be had. That consultation has now been had; and although I am aware that, in what I am about to say, I go beyond the wants of the present case, I feel it a duty we owe to the public, that I make known certain other conclusions at which we have arrived.

A majority of the court holds, that the State courts have jurisdiction of the writ of *habeas corpus*, in all cases which come within either of the following classes: *First*, where the petitioner claims that the conscript laws do not reach him, or authorize his enrollment as a conscript, because he is under or over age, not a white man, or not a resident of the Confederate States; *Second*, where the

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party claims that he stands absolutely and unconditionally exempt from military service, because he belongs to some sect or class, which the act of congress declares operates an exemption; such, for example, as Friends who have complied with the law, and officers, judicial and executive, of the State and Confederate governments. Questions may arise under the regulations which permit the putting in of substitutes, over which I would not hesitate to exercise jurisdiction; but, for reasons satisfactory to myself, I prefer not to define, at present, the extent to which I would exercise such jurisdiction.

Wherever, as in the present case, the privilege of exemption is granted on conditions, the adjudication of which is expressly reserved to certain officers named or provided for; or, where the acts of congress declare that the exemption shall cease and determine on the happening of certain events, *to be judged of and determined by the secretary of war, or other designated officer*, I hold, that such condition is a legitimate limitation on the boon of exemption, which congress had the clear right to impose; and that State courts have no authority to supervise the action of such officers, thus provided for and exercised, or to retry any question thus exclusively conferred on an officer of the Confederate government. To entertain jurisdiction in such cases, would lead to the most embarrassing and disastrous collisions between the authorities of the two governments.

I am of that school who believe, that the Confederate government is one of limited and defined powers, and that great care should at all times be exercised, to prevent it from enlarging its powers by construction. Our compound system of government, perhaps, exposes the States to encroachments upon their reserved rights, more than any other form of constitutional government could do. This grows in part out of the fact, that, within the sphere of their operation, the constitution of the Confederate States, and the acts of congress passed pursuant thereto, are the supreme law of the land. The constitution, in addition to its enabling clauses, which confer

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powers on the government, contains several restraints upon State authority. Under these clauses, an appellate jurisdiction was built up in the supreme court of the United States, which, in my opinion, was, in some instances, carried to an extent of doubtful propriety. I will not discuss this question here, further than to say, that I think many of the imputed errors which crept into the old system grew out of the mistaken theory of the oneness of our distinct governments, and the too great subordination of the State to the Federal government. One source of alleged encroachment of Federal upon State authority has been removed, by a wise amendment of the second section of the third article of the constitution; and other amendments have also shorn our young government of much of the power which the old one wielded to our detriment. I hope that, when the Confederate judiciary shall be fully organized, the heresies which aided in overthrowing the old Union, will not be allowed to enter the sanctuaries of the new.

I do not mean, in what I have said, to question the distinguished ability which has, at all times, marked the long and brilliant history of the Federal supreme court. My precise meaning is, that, in my judgment, false views of the powers of the Federal government, and especially of the relations which the States sustain to that government, found utterance at an early day; and that the court, in later years, although it burst some of the fetters by which early precedent had sought to confine it, left many of those errors unreversed. Let us avail ourselves of the much good bequeathed to us by the many able minds which have adorned that bench at every period of its history; but let us avoid the errors which time and experience have made manifest.

I have said that an early error crept into our system, as to the relation which the Federal and State governments sustain to each other. In my opinion, we should struggle, from the very threshold of our existence, to keep the powers and functions of the two governments as distinct as possible. The dividing line of jurisdiction,

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where no territorial boundary marks it, must, in the nature of things, be sometimes difficult of ascertainment. Still, the line exists, and, when discovered, must be respected. It is history, now made sadly impressive by the ocean of noble blood which it has caused to flow, that by transgressions of this boundary line, sometimes by the Federal, and sometimes by State governments, our once prosperous and happy country is now the theatre of a war of almost unprecedented malignity and atrocity. That enlightened jurist and venerated patriot, Chief-Justice Taney, speaking for the court, felt and expressed the necessity of preventing encroachments by one jurisdiction upon the other; but his counsels came when fanaticism had well nigh matured its parricidal plot, the culmination of which is now converting portions of our rich domain into a desolation.—See *Ableman v. Booth*, 21 How. 506; *Dred Scott v. Sandford*, 19 *ib.* 393.

The jurisdictional area of each government should be kept distinct—restraining the Confederate government within the boundaries of its delegated authority, and not allowing the State governments to trespass on Confederate jurisdiction. The powers conferred on that government by the Confederate constitution, the laws enacted under its authority, and treaties made pursuant thereto, are the supreme law of the land. Let us respect and obey them as such. Let us not weaken or destroy our Confederate power, by embarrassing that government in the manly exercise of those functions with which the States themselves have clothed it. This will neither destroy nor impair the sovereignty of the several States. They are not despotisms. For certain general purposes, they have conferred on the Confederate government certain attributes of their sovereignty; but they retain the others. They have thus become constitutional, instead of absolute sovereignties. This no more destroys State sovereignty, than does the surrender of certain attributes of natural liberty destroy civil liberty. In upholding and maintaining each government in the exercise of its constitutional authority, each will necessarily be kept

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within the appointed orbit of its powers. This, I humbly conceive, would effectually prevent all collision of jurisdictions. It need not, and would not, interdict the comities and kind offices which belong to good neighborhood. These should be cultivated and strengthened, as the life-blood of our confederate existence.

R. W. WALKER, J., not sitting.

EX PARTE STRINGER.

[APPLICATION FOR HABEAS CORPUS.]

1. Conscientious scruples against bearing arms, as ground of exemption from military service.—A person who "conscientiously scruples to bear arms," may claim exemption from military duty, under the provisions of the State constitution, (art. iv, militia, § 2,) upon payment of an equivalent for personal service; yet he is not entitled, on that account, to exemption from military service in the armies of the Confederate States, unless he belongs to one of the religious denominations specially exempted by the acts of congress.

APPLICATION by Levi M. Stringer, for the writ of *habeas corpus*, to obtain his discharge from the custody of Major W. T. Walthall, commandant of the camp of instruction near Talladega. The petitioner alleged, that he was held in custody at the said camp of instruction as a conscript; that he was a regular member of a "Christian church", and had conscientious scruples against bearing arms; that he was therefore exempt from military service, under that provision of the State constitution which declares, that "any person who conscientiously scruples to bear arms, shall not be compelled to do so, but shall pay an equivalent for personal service," and claimed the right to pay an equivalent for personal service, as therein provided; that he had applied to the Hon. JOHN T. HEWLIN, one of

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the circuit judges of the State, for the writ of *habeas corpus*, claiming his right of exemption from military service on the ground above stated; and that said judge, on the hearing of the writ, had refused to discharge him.

L. E. PARSONS, for the petitioner.

STONE, J.—[March 4, 1863.]—The acts of congress, known as the "conscript laws," are constitutional—*Ex parte Hill*, *in re Willis et al.*, at the present term. Those acts authorize the enrollment and conscription of citizens within the conscript age; and this, without invocation of State authority. The power of the Confederate government to conscribe the citizen, is derived from the Confederate constitution; and is not at all dependent on the constitution of the State of Alabama. The petitioner does not show a case which entitles him to exemption from military service under the acts of congress. Conscientious scruples against bearing arms, unless the party entertaining them belongs to one of the religious sects mentioned in the statute, presents to the courts of the country no legal ground for declaring the petitioner exempt from military duty.

As the opinion of the entire court is not yet announced, nor indeed formed, on the broad question of jurisdiction of State courts in cases like the present;—and as we feel no hesitation in refusing the present application on the merits, we place our refusal on the ground stated above.

The prayer of the petitioner is denied.

R. W. WALKER, J., not sitting.

EX PARTE HILL, IN RE ARMISTEAD vs. CONFEDERATE STATES.

[APPLICATION FOR PROHIBITION TO PROBATE JUDGE.]

EX PARTE DUDLEY.

[APPLICATION FOR HABEAS IN MATTER OF HARKAS CORPUS.]

1. *Jurisdiction of State courts to discharge enrolled conscript from custody of Confederate States officer.*—On petition for *habeas corpus*, by a person who, being liable to military service under the act of congress approved April 16th, 1862, commonly called the "first conscript law," procured and placed in his stead a substitute, and was thereupon discharged; but, after the passage of the "second conscript law," approved September 27th, 1862, was again arrested by the enrolling officer, on the ground that his discharge had become inoperative, because his substitute was personally liable to service under the latter law,—the State court or judge to whom the application for the writ is made, has jurisdiction to determine the question of fact, whether the petitioner placed in his stead a substitute, and was thereupon discharged; and also the question of law, whether such discharge exempted the petitioner from liability to service under the latter law, his substitute being within the conscript age as therein specified. (A. J. WALKER, C. J., *dissenting*.)
2. *Same.*—The commandant of conscripts, at one of the camps of instruction, having vacated, on the ground of fraud, a discharge procured by a person who, being liable to military service under the "conscript laws" of congress, had furnished a substitute in his stead; and the decision of the commandant having been approved by the secretary of war,—a State court or judge has no jurisdiction, on *habeas corpus* or otherwise, to revise or control the action and decision of the commandant, at the instance of the person whose discharge is thus vacated, on the ground that *ex-parte* affidavits were received against him on the trial, or that he was not notified of the time and place of taking testimony, or that he was not allowed an opportunity to cross-examine witnesses. (B. W. WALKER, J., *dissenting*.)
3. *Liability of principal to military service under "second conscript law," having furnished substitute under first.*—The 9th section of the "first conscript law" of congress declaring, that persons not liable to military service "may be received as substitutes for those who are,

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under such regulations as may be prescribed by the secretary of war"; and the general orders (No. 37) published by the secretary of war on the 19th May, 1862, providing, in reference to exemptions procured by furnishing substitutes, that "such exemption is valid only so long as the said substitute is legally exempt,"—a person who was liable to conscription under said law, and who, after the publication of said general orders, placed in his stead a substitute, who was between the ages of thirty-five and forty years, and thereupon obtained his discharge, became again liable to conscription, on the passage of the "second conscript law," and the president's call for men between the ages of thirty-five and forty years; and the same principle applies to persons who furnished substitutes after the publication of the general order (No. 64) dated September 8, 1862, which declares, that "a substitute becoming liable to conscription renders his principal also liable." (*Per tot cur.*)

THESE two cases, though decided together, were argued and submitted at different times. The first was an application by L. H. Hill, an officer of the provisional army of the Confederate States, and the enrolling officer of the district embracing the county of Montgomery, for a writ of prohibition to the probate judge of said county, enjoining and restraining him from further proceedings in the matter of a petition for *habeas corpus*, sued out before him by W. B. Armistead, who sought thereby to procure his release from the custody of said enrolling officer, on the ground that he had obtained a discharge from military service by placing a substitute in his stead. This application was made on a regular motion day of the January term, 1863, and was submitted at the same time with the last preceding case; being argued at the bar by P. T. BAYRE, on behalf of the Confederate States, and by S. F. RICE and JNO. A. ELMORE, with whom was A. B. CLITHBRALL, for the petitioner Armistead.

The other case was an application by Charles H. Dudley, for a *mandamus*, or other remedial writ, directed to the Hon. N. W. COCKE, the chancellor of the southern chancery division, by which the petitioner sought to obtain a full hearing on *habeas corpus* before said chancellor, and a discharge from custody as a conscript. All the

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material facts of the case are stated in the opinion of **STONE, J.**

The opinions were delivered, at different times, during June term, 1863.

STONE, J.—The precise line of division which separates State and Confederate judicial authority, is not always easy of expression, if indeed it be easy of ascertainment. Operating, (within the sphere of its appointed powers,) as each government confessedly does, upon the same territorial area, and upon the same persons, it requires, in some cases, the closest scrutiny to prevent encroachment by one power upon the other. If either government, in the performance of its functions, by mistake or otherwise, transgress the boundary line which separates them, and trespass on the domain of the other, such conduct does not conclude the other government; nor estop it from asserting and enforcing its own rights. On the other hand, if either government, or its officers, act within the sphere of its powers, although such action may be erroneous and reversible, it is not, except in certain specified cases, within the power of the other government to control its action thus performed, nor to correct the errors that may be committed. The distinction is between a want of authority over the person or thing, and an erroneous exercise of authority possessed. If the subject-matter be within the legal cognizance of the officer acting, no matter how far that officer may err in adjudicating or applying the law to such subject-matter, the redress, if any, must, as a general rule, be sought in the courts of the government whose officer has committed the error. But, if the officer exercise authority over a subject or person not within his official cognizance, the judicial officers of the other government may give redress, if the subject-matter be within the general scope of their jurisdiction.

The distinction attempted to be drawn above may be illustrated by the two cases of *Slocum v. Mayberry*, (2 Wheat. 1,) and *McClung v. Silliman*, (6 Wheat. 599.)

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The case of *Slocum v. Mayberry* arose under the 11th section of the embargo law, approved April 26, 1808, (2 U. S. Stat. at Large, 501,) which authorized the collectors of the customs "to detain any vessel ostensibly bound with a cargo to some other port of the United States, whenever in their opinions the intention is to violate or evade any of the provisions of the acts laying an embargo, until the decision of the president of the United States be had thereupon." Under this act, the collector of the port of Newport, Rhode Island, had a vessel, with its cargo, seized by Slocum, the surveyor of the port; and Mayberry, the owner of the cargo, brought his action of replevin for the same in the State court of Rhode Island. The question was, had the State court jurisdiction? The supreme court of the United States, Chief-Justice Marshall delivering the opinion, decided, that if the question had arisen on the seizure of the vessel, the State court would have had no jurisdiction; but, inasmuch as the collector had no power or authority to detain the cargo, the act of congress not making provision for its detention, the State court had jurisdiction of the case.

In the case of *McClung v. Silliman*, the attempt was made to control, by *mandamus* from a State court, the official conduct of a register of a land-office of the United States, in the matter of a pre-emption claim. The court ruled, that the State court had no authority to direct or govern the official conduct of the register of the United States land-office.

So, it has been ruled, that if a marshal of the United States levy on goods under process against A, and B claim that the goods are his property, in a suit by B against the marshal, State courts have jurisdiction of the question, whether the property belongs to B or to A.—*Dunn v. Vail*, 7 Mar. La. 416; *Bruen v. Ogden*, 6 Hals. 370. See, also, *United States v. Peters*, 5 Cranch, 115, 135; *McKim v. Voorhies*, 7 Cranch, 279; *Diggs v. Wolcott*, 4 Cranch, 179; *Kitteridge v. Emerson*, 15 N. H. 227; *McNutt v. Bland*, 2 How. U. S. 9.

Chancellor Kent's statement of the principle under

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discussion is as follows: "If the officer of the United States who seizes, or the court which awards the process to seize, has jurisdiction of the subject-matter, then the inquiry into the validity of the seizure belongs exclusively to the Federal courts. But, if there be no jurisdiction in the instance in which it is asserted—as if a marshal of the United States, under an execution in favor of the United States against A, should seize the person or property of B—then the State courts have jurisdiction to protect the person and the property so illegally invaded."

Springing out of the principles settled in the cases of *Stocum v. Mayberry*, and *McClung v. Silliman*, *supra*; I think the following propositions may be laid down:

First: Whenever an officer, under authority in the premises conferred by the government under which he is acting, is in the performance of official duties; and, in the performance of such duties, there is expressed, or necessarily implied, the right to decide upon qualifications, or to draw inferences from facts, then any error of conclusion, or of judgment, into which he may fall, is not subject to revision or correction by the officers of the other government, nor is the officer acting subject to the coercive control thereof, unless the constitution or laws give to the officers of the latter government such control or power of revision.

Second: Whenever the question is—not whether the officer correctly decided or acted in a matter within the scope of his power and jurisdiction—but, the inquiry is, has he erroneously applied his authority or jurisdiction to a person or subject-matter not within its scope, then the courts of the other government, if the subject and person be of a class which comes within their jurisdiction, may inquire of and determine the question of such erroneous application of authority, unless the law, in its terms, inhibits such inquiry.

There is scarcely any human action that is so entirely independent of all others, that in its performance it does not presuppose the existence of some other fact, past or

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present. These do not necessarily inhere in the subject-matter in hand, but are the accidents of the particular case. All actions are shaped or moulded, more or less, by their accidents, and the decision which the actor pronounces upon them. Slooam, in seizing the vessel and cargo, construed the act of congress for himself, and attained the conclusion, that it was his duty to detain the cargo as well as the vessel. In this, he traveled beyond his authority. The act of congress clothed the collector with authority to decide, in the first instance, whether it was the intention to violate or evade any of the provisions of the acts laying an embargo; and if, in his opinion, such was the intention, he was authorized to detain the vessel. He had no authority to detain the cargo. The question of detaining the cargo did not inhere in, or pertain to, the other and main question, namely, was there an intention to violate or evade the law? He erred in deciding this question of law. So, in the case of the marshal who seized the goods of B under process against A. He went beyond his authority when he seized the goods of B, and by that act became a trespasser. True, in seizing the goods of A, he must necessarily determine for himself, in the first instance, what goods belonged to A; but the decision was rendered necessary only by the accident that the goods of A and B were in a state of confusion. This is no more than the case of C and D, co-terminous land-proprietors, between whom the boundary is open and unascertained: if C, whether by mistake or otherwise, go over the line upon the lands of D, and there cut timber, he is a trespasser, and it does not excuse him that, in endeavoring to find his own land, he must necessarily decide where the boundary is.

The case of *McClung v. Silliman*, *supra*, illustrates the other phase of this question. In that case, the effort was made, through the instrumentality of a State court, to compel the register of the land-office to receive proof of the legal acts, and to prepare and furnish the documents which should initiate the applicant's claim to a pre-emption interest in a tract of land. The register refused the

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application. It will be observed, that the register was an officer of the United States, and was specially charged with the hearing of such applications, and with receiving and acting on the evidences on which such claims were based; and that all this was done under laws and rules enacted and established by the government of the United States. These several acts were part and parcel of the functions with which the land-officer was expressly clothed, and pertained naturally and universally to the service in which he was engaged. They were not the accidents of the case, but were important functions committed to him, which were called into exercise in every application for pre-emption made in his district. The supreme court of the United States denied the jurisdiction of the State court to control the action of the register by *mandamus*, saying: "The question in this case is as to the power of the State courts over the officers of the general government, employed in disposing of that land, under the laws passed for that purpose. And here it is obvious, that he is to be regarded, either as an officer of that government, or as its private agent. In the one capacity or the other, his conduct can only be controlled by the power that created him."

The precise facts of Mr. Armistead's case, as made by the petition for *habeas corpus*, are as follows: In August, 1862, the petitioner, being liable to conscription, procured and placed in the service of the Confederate States a substitute who was over thirty-five years of age; said substitute was accepted by the proper military authorities, and was mustered into the service, and thereupon the said Armistead received his discharge. The enrolling officer, contending that the probate judge has no jurisdiction of the questions presented by Mr. Armistead's petition, makes application to us for the writ of prohibition to that officer.

The questions which arise on the face of the petition for *habeas corpus*, are: First, was a substitute for Mr. Armistead accepted by the proper government officer,

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and did he (Mr. Armistead) receive his discharge? Second, is the legal effect of that discharge such as to exempt Mr. Armistead from conscription under the "act to amend an act entitled 'an act to provide for the public defense,' approved April 11, 1862," commonly called the "second conscript act?"—C. S. Statutes at Large, 2d session of 1st Congress, p. 61.

No question is made in this case on the fairness of the transaction by which Mr. Armistead obtained and put in his substitute; and nothing need be said in this case on that head.

We hold, that the probate judge had jurisdiction of each of the questions above stated. The first is a question of fact, which does not involve any revision or possible reversal of any decision pronounced by the Confederate officer or officers, charged with the duty of receiving substitutes. It does not involve the inquiry, did the officer act rightly in granting the discharge? The only question is, did he act? If the petition for *habeas corpus* truly state the facts, the petitioner had received his discharge from military service; and the question of fact was, discharge *vel non*. The act of congress, approved April 16, 1862, (§ 9,) provides, "that persons not liable for duty, may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war."—Pamphlet Acts 1st session of 1st Congress, p. 31. General orders Nos. 29 and 30, of 1862, of dates 26th and 28th April, provide, that on the receipt and mustering in of such substitute, the principal furnishing the substitute shall receive his discharge.

The second question was one of law; namely, does the discharge thus obtained, and not vacated for fraud, operate an exemption from military service under the second conscript law? The decision of this question by the probate judge does not involve a revision of any executory action of the Confederate officer. If it be a revision of anything, it is simply the decision of the Confederate officer, pronounced on the legal effect of certain acts, previously performed; nothing more nor less than determin-

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ing whether the officer rightly decided the legal question as to the effect of the substitution and discharge—the accident of Mr. Armistead's case. If both of these questions be decided in favor of Mr. Armistead, he stands absolutely and unconditionally exempt from liability to conscription, under the law as it then stood. If either of them be decided against him, he was not illegally restrained of his liberty. The decision of neither of the questions could have the effect of reversing or annulling any action of the Confederate officer, the performance of which was specially or exclusively confided to him. The writ of prohibition must be refused.—*Ex parte Hill*, at the last term.

Judge R. W. WALKER agrees with me in the foregoing conclusions, as to the jurisdiction of the probate judge in the case of Armistead, for reasons stated by himself. Chief-justice A. J. WALKER dissents, for reasons stated by himself.

The bill of exceptions in the case of Charles H. Dudley omits many dates, and, in other respects, leaves us in doubt as to the true state of facts on which the chancellor pronounced his decision. The present application seeks to reverse and control the action of the chancellor; and under a well-known rule, it is our duty to draw every fair inference favorable to his correct ruling. If there be error, the party excepting must affirmatively show its existence.—*Shep. Dig.* 572, §§ 145, 146; *Doe v. Godwin*, 20 Ala. 242; *Guilford v. Hicks*, 36 Ala. 95.

The record informs us, that Mr. Dudley attempted to show, on the trial of the *habeas corpus*, the following state of facts: That in August, 1862, he reported himself at camp Watts, with one Peters, who was examined, accepted, and mustered into the service as Dudley's substitute, and he (Dudley) thereupon received his discharge; that some time afterwards, (date not given,) Major Swanson, commandant of conscripts at that camp, had him (Dudley) ordered back to camp, and detained him there; that the pretense on which he was ordered back, was some

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alleged fraud or duress practiced in procuring and putting in his substitute, Peters; that he applied to the secretary of war for leave to examine witnesses, and to cross-examine those against him; that this application was received by the secretary of war in December, 1862; that thereupon the sentence was suspended, and time allowed to rebut the evidence against him; that petitioner sought to have an order made, requiring mutual notices of the time and place of taking testimony, but failed to obtain such order; that on the last day allowed to petitioner to produce proofs, &c., *ex-parte* affidavits were again produced against him, heard as evidence, and the former decision sustained; that he again applied to the secretary of war, to open and extend the time for the examination of witnesses, but his application was refused,—the secretary of war ruling, that the substitution was set aside for fraud.

No dates are specified when any of these transactions took place, except three: first, the order of the secretary of war made December 1, 1862, instructing the commandant to discharge Peters and detain Dudley; second, the time alleged, December, 1862, when the secretary of war received Dudley's first application to extend the time for testimony; and, third, that the extended time expired February 20th, 1863, for taking testimony in the cause. The application for *habeas corpus* was sworn to April 6th, 1863.

When the trial had so far progressed, as to bring to the notice of the chancellor the fact that the substitution had been set aside for fraud, and the order of the secretary of war had been issued thereon, refusing further extension of time, and approving the detention of Mr. Dudley as a conscript, the chancellor refused to proceed with the examination, declining to re-try the question of fraud in the matter of putting in Peters as a substitute for Dudley. We are asked to control the action of the chancellor by *mandamus*, or such other writ as may be necessary for the purpose.

We are not able to affirm positively whether or not the first order, vacating the substitution for fraud, was made

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before or after November 3d, 1862; but we must presume it was made after that time, as that presumption is most favorable to the correct ruling of the chancellor. The dates given incline us to believe such was the fact.

In general order No. 82, for the year 1862, under date of November 3d, are found orders relating to substitution, from which we make the following extract: "When a person claims exemption, on the ground that he has put a substitute in service, he must exhibit to the enrolling officer a discharge from some company, signed by the commanding officer of the regiment or command to which the said company belongs, or then belonged, (see general order No. 26,) or an exemption signed by the commandant of conscripts. And if the said discharge or exemption do not show that it was granted in consideration of a substitute having been furnished, such fact must be certified in writing by the commanding officer of the regiment or command to which the company belongs, or by the commandant of conscripts, as the case may be. But, in all cases arising within thirty days from the date of this order, the enrolling officer may grant the exemption, upon satisfactory proof that the party furnished a substitute, who was actually received into the service of the Confederate States for three years or the war, and the substitute is not liable to military service. Such exemption may at any time be canceled, if fraud or mistake be discovered."

I have given this lengthy extract, not because each clause, *per se*, bears on the question before us, but to show by the context what are the meaning and purpose of the last clause quoted. What, then, is the meaning of the language, "such exemption may at any time be canceled, if fraud or mistake be discovered"? Obviously, not that the agreement between the principal and the substitute should, as a binding obligation between themselves, be liable to be canceled for fraud, under proceedings had in the courts of the country. That right, so far as they were individually concerned, existed independently of the order. Nor, indeed, had the secretary of war the power

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of conferring such right upon mere private parties, nor of clothing State courts with such authority.—2 Story on Cons. §§ 1755-6, and note 2. Such an order, having that object, could not be regarded as a regulation of the privilege of putting substitutes in the army. Moreover, it can not be supposed that the Confederate government, even if it had the power, would deem it necessary to furnish the parties with a safeguard against imposition among themselves, cumulative and special, beyond that which all citizens enjoy under the general law. Fraud upon the public service was evidently had in contemplation. This is shown by the language of the order, and by the context, and is fully confirmed, if confirmation be necessary, by the great notoriety which the numerous frauds of that kind had acquired in the country.

This being the case, it is manifest that the inquiry of fraud *vel non*, for which the order makes provision, was not intended to take place in the ordinary course of proceedings in the courts of the country. The intention was, that the commanding officer, or commandant of conscripts, should inquire of and determine the question of fraud in the matter of the substitution. The purpose of the order was, to protect the public service against frauds on the privilege of putting in substitutes. The officers above named were, by irresistible implication, charged with the duty of trying the question of fraud; and, if it were found to exist, of canceling the exemption. There is doubtless a final appeal to the secretary of war in such cases; but when the decision is finally pronounced, the result is, if there has been fraud, to turn the substitute out of the service, and to place the principal in. In passing upon the question of fraud *vel non*, the commanding officer, commandant of conscripts, or secretary of war, as the case may be, must necessarily and uniformly hear and decide upon evidence, and draw inferences from facts. These things inhere in the very nature of the inquiry to be made. They always come up, and, hence, are not the accidents of the particular case. They are like the preliminary proofs, and documentary exemplifications, which

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pertain to the functions of a land-office register, in the matter of pre-emption claims. To allow the State courts to re-try or re-examine the facts on which such decision is pronounced, is to give to the courts of the State government appellate jurisdiction over the commanding officers, commandant of conscripts, or the secretary of war; officers who receive their appointments from the Confederate government, and are specially charged, by that government, with the performance of these functions. The issue in such cases is not solely, nor even mainly, between the principal and the substitute. The Confederate government is directly concerned in the result; and, in its military service, will be the chief sufferer from a reversal of the decision pronounced by the commanding officer, or other officer acting in the premises. State courts have no authority to re-try the question of fraud *vel non*, in the matter of putting a substitute into the army, under the rules above copied.

If the commandant of conscripts, or the secretary of war, in violation of the plain rules of law, canceled the substitution in this case, on evidence furnished by *ex parte* affidavits, or refused to require notice of the time and place of taking the testimony, or did not afford to Mr. Dudley an opportunity to cross-examine the witnesses against him, each and all of these are but an erroneous exercise of rightful authority—not usurpation. The redress, if there be any, must be invoked from the authorities of that government which created the officer, and clothed him with his functions.—*McClung v. Silliman*, 6 Wheat. 598; *Ableman v. Booth*, 21 How. 506.

The chancellor did not err in refusing to re-try the question of fraud; and the motion of petitioner must be denied.

The chief justice concurs in this conclusion. His own opinion contains his reasons. The opinion of Judge H. W. WALKER shows how he stands.

Mr. Armistead's application for enlargement rests, as his petition informs us, on the fact that, in August, 1862,

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he put in a substitute, who was over thirty-five years of age, and who was accepted, and he (Armistead) discharged. The petition does not aver, that the substitute was over forty years old when the writ of *habeas corpus* was applied for. The application was made January 27, 1862,—after the passage of the amendment to the conscript law of September 27, 1862, and after the call of the president for all up to the age of forty who were not legally exempt. We suppose, from the silence of the petition, that the substitute was in fact under forty years of age; and that the real controversy between Mr. Armistead and the enrolling officer, grows out of a difference of opinion between them, as to the effect of the president's call for conscripts up to the age of forty, on those persons who had previously obtained their discharge by putting in substitutes who were, at the time of the second call, liable to do military service on their own account, being within the then conscript age. Supposing this to be the main question in the cause, and entertaining, as we do, a deliberately formed opinion upon it, with which we are satisfied, we will proceed to announce it for the guidance of the present trial, and for others similarly circumstanced.

What, then, is the effect upon the principal of the enlargement of the conscript age, so as to embrace within its scope the substitute on whose account the principal had obtained his discharge? The conscript law (section 9) declares, "that persons not liable for duty, may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war." Stat. at Large, 1st session of 1st Congress, p. 31. This clause of the statute applies equally to conscripts called for under the second conscript law, which is but an amendment of the first.—Stat. at Large, 2d sess. 1st Congress, 61. The regulations prescribed by the war department for carrying into effect the conscript laws, so far as they affect the question in hand, are found in general orders of the year 1862, Nos. 29, 30, 37 and 64: General order No. 29, of date April 26, 1862, and general order

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No. 30, of date April 28, provide the rules for reporting, examining, receiving and mustering in the substitute, and for discharging the principal. General order No. 37, of May 19, 1862, after copying the first exemption statute, and specifying certain exempts from military service, contains this clause: "IV. No persons, other than those expressly named, or properly implied in the above act, can be exempted, except by furnishing a substitute exempt from military service, in conformity with regulations already published, (general orders No. 29;) and such exemption is valid only so long as the said substitute is legally exempt." General order No. 64, September 8, 1862, contains this clause: "A substitute becoming liable to conscription, renders his principal also liable, unless exempt on other grounds."

Three decisions have been brought to our notice, pronounced on applications similar to that of Mr. Armistead: One in the matter of Cohn, made by Judge McGRATH, of the district court of South Carolina; a second in the matter of Underwood and Allen, made by Judge JONES, of the district court of Alabama; the third, in the matter of Irvin, made by C. J. PEARSON, of the North Carolina supreme court. Each of the opinions delivered in these causes ignores general order No. 37, of May 19; and neither Judge JONES nor Chief-Justice PEARSON makes any allusion to general order No. 64, of September 8. We must suppose their attention was not directed to these orders. Judge McGRATH makes some allusion to general order No. 64; but he treats it, not in its legislative, or prospective feature, but in its judicial, or retrospective bearings. He announced the opinion, that it was within the power of Congress, or the president, to call into the military service those who had been discharged on putting in substitutes; but that the secretary of war could not do so. These three decisions are rested, mainly, on the constructions which the learned judges delivering them place on the two conscript laws of April 16, and September 27, 1862.

The line of argument employed in these several opinions

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is not precisely the same; but in the points actually decided, there is a substantial conformity. The following propositions, it is believed, express the principles on which each of them rests, with sufficient accuracy to do the authors of them no great injustice: *First*, That the petitioners, by putting in substitutes, had obtained discharges under the act of April; *Second*, That the act of September placed in the army only those persons who are between the ages of thirty-five and forty-five, and, consequently, did not put into the army the petitioners, who were under thirty-five; *Third*, That the act of September was passed to call into the service persons within the specified age, who were *out* of the service—not those who were *in*, as the substitutes were; and that congress cannot be supposed to have intended that the substitutes should be mustered out of the service, that they might be again mustered in as conscripts, in order thereby to reach the principals who put in those substitutes.

To each and all these propositions, as expressed, we unhesitatingly assent. The conclusion drawn from them is not so clear. But, what is meant by the idea expressed in these opinions, that the substitute is not to be mustered out of the service, that he may be again mustered in as a conscript? Is it intended thereby to combat an argument, leading to revivor of the principal's liability to military service under general order No. 64, provided the substitute is under forty? If such be the argument, we think it entirely misconstrues the language of general order No. 64—viz., "A substitute becoming liable to conscription, renders his principal also liable, unless exempt on other grounds." It does not mean that the substitute shall be in fact conscribed. The language will not admit of such construction, without great violence to its terms. The object of the regulation was not to place the substitute in the army; he was already in. The purpose was to declare the effect and scope of the exemption which the principal should enjoy, as the result of putting in a substitute. Its operation was upon the principal; but the event or contingency, on which its operation depended,

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pertained to the substitute. "Becoming liable to conscription," must mean that, in consequence of a change of the law, or of the *status* of the substitute, he comes within the age or description of persons liable to do military service on their own account. He cannot perform double service; and being liable to serve on his own account, he ceases to be a valid substitute for another. He has then become *liable to conscription*.

The true construction of the statute and general order is, that persons under thirty-five years of age, who put in substitutes between the ages of thirty-five and forty, are, in consequence thereof, exempt from military service, only until the substitute, by a change of the conscript age, or other circumstance, is embraced within the terms of the call. The principal then becomes again liable to serve in his own place; not under the act of September, but under the act of April, from which service he had enjoyed a temporary and defeasible exemption.

What we have said above is in reply to a supposed argument, based on general order No. 64. That order was issued on the 8th September, a month or more after Mr. Armistead claims to have put in his substitute. We need not, and do not, decide whether that order was intended to operate retrospectively, or only upon substitutions perfected after that time. Mr. Armistead's case is clearly covered by general order No. 37, of May 19, copied above; for his substitute was put in in August, more than two months after that order was issued. The statute, in conferring the privilege of putting in substitutes, provided that it should be "under such regulations as may be prescribed by the secretary of war." Substitution is not, *per se*, a right: it is a boon—a privilege conferred. Congress, in granting it, was authorized to clog it with conditions; and it did so. It cannot be claimed, without a compliance with the regulations issued from the war department; and these regulations may be changed from time to time. The orders of 26th and 28th April—Nos. 29 and 30—contain no such clause as that found in the order of 19th May. Perhaps that subject was not thought

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of when the orders of April were issued. The order of May is too clear to admit of cavil or doubt. It provides, that the exemption obtained on putting in a substitute, "is valid only so long as the substitute is exempt." This regulation, being made pursuant to authority conferred by congress, has the binding efficacy of law. It was part of the public law when Mr. Armistead put in his substitute, and therefore became part and parcel of the act done. He cannot complain of a breach of governmental faith, for he is charged with a knowledge of the terms on which his substitute was received. Neither can it, with any plausibility, be contended, that the order of 19th of May, declaring when the exemption shall expire, must be restricted in its operation to a certain limited number of contingencies, on the happening of some one of which the exemption of the principal shall cease. The language is as broad as it can be expressed—"only so long as the said substitute is legally exempt." If under forty, he ceased to be legally exempt when the call was made for conscripts up to that age; and Mr. Armistead's exemption, by reason thereof, then ceased to be valid.

We might add to this argument, but do not perceive how we could make it clearer. It is one of those plain propositions which, in our conception, scarcely leaves any field for argument. Its strength lies in the statement of it.

The supreme court of the State of Georgia, on the application of Farrell and Williams, has recently had this subject under discussion, and has placed the same construction which we do on the order of May 19, 1862.

We need not, and do not, decide whether general order No. 37 retroacts on cases of substitution which were consummated before it was issued. No case of that kind has come before us, and we reserve our opinion until the question is properly presented.

It may not be improper to add, that this part of the opinion is concurred in by the entire court.

A. J. WALKER, C. J.—In *Ex parte Hill*, at the last

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term, I delivered an opinion, denying the jurisdiction of a State judge to discharge, on *habeas corpus*, one who had been enrolled as a conscript, upon the ground of his exemption from conscription. Neither subsequent reading and reflection, nor the opposing arguments of other judges, have changed my convictions. The question again arises in these cases; and I embrace the opportunity which is thus afforded, to fortify and extend my former argument. In doing so, I shall avoid, as far as possible, a repetition of what I have heretofore said. I therefore refer to my opinion in *Ex parte Hill in re Willis et al.*, which must be read in connection with this, in order that the entire argument may be understood.

While the State courts have a concurrence of jurisdiction with the courts of the general government, where there is no legislative exclusion, over most subjects cognizable in the latter tribunals, this concurrence is not universal. The line of division between the concurrent and exclusive jurisdiction of the courts of the general government is not distinctly and clearly defined. I refer to discussions upon that subject, without comment, as my argument does not require that I should attempt to deduce from the authorities any general rule, which will govern in all cases the question of concurrence or exclusiveness of jurisdiction.—1 Kent's Com. (m. pp.) 395 to 401; *Martin v. Hunter*, 1 Wheat. 304; *Houston v. Moore*, 5 Wheat. 1; *Teal v. Felton*, 12 How. 284. I adopt, with a modification as to the name of the government, the following language of Judge Story: "It would be difficult, and perhaps not desirable, to lay down any general rules in relation to the cases in which the judicial power of the courts of the United States is exclusive of the State courts, or in which it may be made so by congress, until they shall be settled by some positive adjudication of the supreme court. That there are some cases, in which that power is exclusive, can not well be doubted; that there are other cases, in which it may be made so by congress, admits of as little doubt; and that in other cases, it is concurrent in the State courts, at least until

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Congress shall have passed some act excluding the concurrent jurisdiction, will scarcely be denied."—2 Story's Com. on the Constitution, § 1754.

The concurrence of jurisdiction in the State courts, over subjects falling within the judicial power of the Confederate States, is subject to exception. The judicial power of our general government extends to all cases arising under its constitution and laws. I maintain, that so much of that jurisdiction as is exercised in the application of judicial correctives to the irregularities and errors of the executive officers of that government, charged with the enforcement of the conscript law, is necessarily exclusive; and that such officers, when acting within the limits of their authority, can not be interfered with by a State court, although they may commit errors. As the government, in the execution of the conscript law, reaches and affects the persons of its citizens; and as any irregularity or error of the officers must wrongfully infringe the liberty of the citizen, the corrective must be obtained through a writ of *habeas corpus*, operating upon the erring officer. The proposition which I maintains, leads, therefore, directly to the assertion, that the erroneous action of such officer, within the limits of his authority, or the incorrectness with which he discharges his duty, although injuriously affecting the liberty of the citizen, may be corrected by a Confederate, but not by a State court, through the instrumentality of the writ of *habeas corpus*.

The constitution bestows upon the government, not only the power of making laws, but the power of executing them. It prescribes that the president "shall take care that the laws be faithfully executed." Under the old articles of confederation, which preceded the constitution of the United States, the important powers of the government were executed through the agency of the States. The clause of the constitution above stated remedies that defect in the old system, and gives to the government authority to act directly upon individuals in the execution of its powers.—Federalist, XV. pp. 65 to 71;

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Calhoun on the Government and Constitution of the United States, 168. The constitutional authority to execute the law, is as ample and complete as the authority to pass it. The execution of the law must be accomplished, generally, through subordinate officers. Congress may prescribe the duties of such subordinate officers, but the constitution bestows authority to perform those duties. The constitution imposes no qualification or restriction upon this authority to execute the law. The political doctrines of secession and nullification suggest remedies for the usurpation of power, by the action of bodies representing the sovereignty of the States. The line of my argument does not touch either of those doctrines. When the government, in the exercise of its constitutional power to execute the law, through its officer, errs in the performance of its duty, and wrongfully touches the liberty or property of the citizen, the remedy by which the error may be corrected and the wrong prevented is judicial. To concede the power of a State court to apply that remedy, and thus to interfere with, and control and govern as to the manner of executing the law, is to confess that the power of execution is qualified and restricted to such mode and to such line of conduct as a State judge may approve. This power of executing the law is delegated by all the States, for their common good; and it would be a usurpation for the judge of one State to assume to control the government in the exercise of that power. If such control can be exerted by the judge in one State, it might result, that a power conferred for the good of all, when performed in a manner approved by the judges of all the States except one, would be thwarted by the interference of the judge in the single State who differed in opinion from the judges in the other States. The States gave the power, without qualification. This gift is the surrender of all right to control the government in the exercise of it.

I do not say that congress can abridge or qualify the jurisdiction of the State courts. The want of authority in the State tribunals, to supervise and control the exe-

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cutive officers of the Confederate States, in the exercise of their appointed functions, by the writs of injunction, replevin, *habeas corpus*, or other process, results from the delegation in the constitution of an unqualified power to execute the laws which congress may enact, and not from any denial of such authority by act of congress. If a State court can not correct, under a writ of *habeas corpus*, the errors of the enrolling officers engaged in enforcing the law of conscription, it is because the constitution bestows the power to execute the law without any qualification that it shall be done in a manner consistent with the judgment of a State judge, and not because congress has suspended, or can suspend, the writ of *habeas corpus*.

The constitutional power of executing the laws of congress, whether they touch the person or the property of the citizen, can not be subordinated to the authority of a State tribunal, by its supervision and control of the conduct of the executive officers acting within the area of their jurisdiction. This is an inevitable deduction from the proposition, that the general government is, within the sphere of its delegated powers, co-ordinate with the respective States, and their equal; and that, within the area of its appointed attributes, its authority is as paramount as that of the States within the boundary of the powers not delegated nor surrendered. No ingenuity can successfully controvert this proposition. It rests for its basis upon the unqualified character of the grants of authority by the constitution. It has the repeated sanction of Mr. Calhoun, who, for years, applied his logic and learning to the investigation of the relations of the States with the government of the United States; who stood, in life, the vigilant guardian of the rights of the States, and a foe to the encroachments of the Federal government; and who, dying, has left in his "Discourse on the Constitution and Government of the United States," his views as matured by experience and protracted application to the subject. From this posthumous work I make the following extract: .

"The government of the States sustained to the for-

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mer [the confederacy which preceded the constitution of the United States] the relation of superior to a subordinate;—of the creator to the creature; while they now sustain to the latter [the government of the United States] the relation of equals or co-ordinates. Both governments—that of the United States and those of the separate States—derive their powers from the same source, and were ordained and established by the same authority; the only difference being, that in ordaining and establishing the one, the people of the several States acted with concert, or mutual understanding; while in ordaining and establishing the others, the people of each State acted separately, and without concert or mutual understanding, as has been fully explained. Deriving their respective powers from the same source, and being ordained and established by the same authority, *the two governments, State and Federal, must, of necessity, be equal in their respective spheres; and both being ordained and established by the people of the States respectively, each for itself, and by its own separate authority, the constitution and government of the United States must, of necessity, be the constitution and government of each, as much so as its own separate and individual constitution and government; and therefore they must stand, in each State, in the relation of co-ordinate constitutions and governments.*”—Pages 166–167.

“It is obvious from this sketch, brief as it is, taken in connection with what has been previously established, that the two governments, general and State, stand to each other, in the first place, in the relation of parts to the whole; not, indeed, in reference to their organization or functions, for in this respect they are perfect; but in reference to their powers. As they divide between them the delegated powers appertaining to the government, and as of course each is divested of what the other possesses, it naturally requires the two united to constitute one entire government. That they are both paramount and supreme within the sphere of their respective powers, that they stand within those limits as equals, and sustain the relation

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of co-ordinate governments, has been fully established. As co-ordinates, they sustain to each other the relation which subsists between the different departments of government—the executive, the legislative, and the judicial, and for the same reason. These are co-ordinates, because *each, in the sphere of its powers, is equal to, and independent of the others*, and because the three united make the government. The only difference is, that, in the illustration, each department by itself is not a government, since it takes the whole in connection to form one; while the government of the several States respectively, and that of the United States, although perfect governments in themselves, and in their respective spheres, require to be united, in order to constitute one entire government. They, in this respect, stand as principal and supplemental, while the departments of each stand in the relation of parts to the whole.”—Pages 197–198.

“That they are both governments, and as such possess all the powers appertaining to government, within the sphere of their respective powers—the one as fully as the other—can not be denied.”—Page 241. See, also, pages 225, 242, 243, 252, 253.

The preamble to the constitution of the United States represents that instrument to be ordained and established by “the people of the United States.” The preamble to the constitution of the Confederate States represents it to be ordained and established by “the people of the Confederate States, each acting in its sovereign and independent character.” The latter is precisely what Mr. Calhoun construed the former to be.—Discourse on Con. and Gov. of U. S., p. 128. The pertinency of Mr. Calhoun’s observations to the question in hand is, therefore, not affected by the difference in language just noticed.

Under our compound system of government, the general government and the States are the peers of each other; and the authority of each, within the scope of its powers, is paramount over the other. To each there is a like negation of right to control the other in the exercise of its authority. The State can no more control the gen-

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eral government in the exercise of its powers through its appointed agents, than can the general government control the States in the exercise of their respective powers. The courts of the general government are limited in their jurisdiction. Aside from this consideration, and as a mere question of governmental power, the State tribunals can no more release from the custody of the executive officers of the general government one taken as a soldier, because, in the judgment of such tribunal, such person was not within the operation of the act of congress, than could a tribunal of the general government take from the custody of a State officer one taken as a State soldier, because, in its judgment, such person was not within the operation of the act of the State legislature. This must be so; otherwise, the two governments are not co-ordinate or equal.

Chief-Justice Taney, speaking the unanimous opinion of the judges of the supreme court of the United States, but carried the propositions of Mr. Calhoun to their obvious and necessary result, when, in the case of *Ableman v. Booth*, (21 How. 516,) he penned the following sentence: "The powers of the general government and of the States, although both exist, and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge, as if the line of division was traced by landmarks and monuments visible to the eye." While this sentence has been criticised for even its guarded application of the term *sovereignty* to the government of the United States, it is, in its substance and its import, but the embodiment of a great principle, obviously deducible from the teachings of Mr. Calhoun.

The principle for which I contend, is not only sustained by reasoning drawn from the relation of the governments, State and Confederate, to each other, but is established by judicial precedents, which every lawyer is

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bound to respect, if not to obey. The embargo act of 1808 authorized collectors of customs to detain *vessels*, whenever in their opinion there was an intention to violate the provisions of the act; but it was silent as to the cargo. A vessel and *its cargo* having been detained, Chief-Justice Marshall held, that an action could be maintained in a State court for the recovery of the *cargo*, because the act of congress gave no right of seizure or detention as to it; but that an action for a vessel tortiously seized could only be brought in the Federal courts; and that the officer having a right to seize for a supposed forfeiture, the question, whether that forfeiture had been actually incurred, belonged exclusively to the Federal courts, and could not be drawn to another forum.—*Slocum v. Mayberry*, 2 Wheaton, 9. The opinion says: "Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of congress, and the jurisdiction of a State court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the State court."

If there were no law authorizing conscription, and yet a citizen had been conscribed into the army, a case would be presented analogous to that over which the jurisdiction of the State tribunal was maintained in *Slocum v. Mayberry*. The case actually presented is one where there is a law authorizing conscription, and it is alleged that the proper officer has erred in the execution of the law, and wrongfully taken a citizen. This case is strictly analogous to that of which, it is declared, the State court has no jurisdiction. It is analogous to the case which would have been presented, if a collector of customs, authorized to seize vessels characterized by an intent to violate the law, had erred, and seized one not so characterized. In reference to such a case, the opinion above referred to declares, that the question, whether the forfeiture has actually been incurred, belongs exclusively to the Federal courts, and can not be drawn to another

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forum; and that it depends upon the final decree, whether the seizure shall be deemed rightful or tortious. So, in the case in hand, the act of congress empowers the officer to conscribe persons characterized by certain qualities of age and capacity; and the question, whether the persons conscribed possess those qualities, belongs, so far as the controlling of the officer is concerned, exclusively to the Confederate courts, and can not be drawn into another forum.

By the supreme court of the United States it has been held, that a *mandamus*, to compel the register of a land-office to perform an official duty as to an entry of the public land, could not be issued by that court, because it could not exercise original jurisdiction over such a subject. It was held, also, that the writ for such purpose could not be issued by the circuit court of the United States, notwithstanding the judicial power of the United States under the constitution extended to such a case. This latter decision is put upon the reason, that congress had not, by the judiciary act, delegated the judicial power of the government to control the register of the land-office by *mandamus*. Although it thus resulted, that no judicial tribunal of the United States, under the existing legislation, could give to an injured party redress, by compelling an officer to permit an entry of land, it was decided, that a State court had no jurisdiction over the subject, and an attempt to exercise it was rebuked, as "an instance of the growing pretensions of some of the State courts over the exercise of the powers of the general government."—*McIntyre v. Wood*, 7 Cranch, 504; *McClung v. Silliman*, 2 Wheat. 369; *McClung v. Silliman*, 6 Wheaton, 598. See, also, *Marbury v. Madison*, 1 Cr. 137; *Lytle v. Arkansas*, 22 How. 193; *Barnard v. Ashley*, 18 How. 45. The question is the same, whether the injury results from an error of omission or commission; and the principle which governs in the former case, must apply in the latter. Other cases of like character are collated by Chancellor Kent in his *Commenta-*

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ries, as will be seen by reference to an extract from that work made in my former opinion.

The principle which I assert is most clearly sustained and forcibly illustrated by the cases growing out of the fugitive-slave law. The act of 1850 authorized the reclamation of fugitive slaves, by the procurement of a warrant from a commissioner, or by seizing and taking the fugitive before a commissioner, whose duty it was to grant a certificate, authorizing his removal to the State from which he escaped.—Brightley's Digest, 296, § 8. The proceeding before the commissioner, under that law, was summary, and *ex-parte*, and might be based upon affidavit made in the State from which the fugitive escaped. The courts of the United States held, that a State court had no power to interfere with the owner or marshal engaged in executing that law; and the South applauded the decisions, as asserting the only principle by which an execution of the law could be had in a community made, by fanatical opposition to slavery, unmindful of constitutional duty. The principle asserted in those cases, arising under the fugitive-slave act, is identical with that which I am endeavoring to maintain. It is a well-established doctrine, that where two courts have concurrent jurisdiction, the exercise of the jurisdiction by one of the courts ousts the authority of the other. It is admitted, therefore, that the denial to a State court of jurisdiction as to a particular subject, over which a Federal court has commenced to exercise its authority, affords no argument against the existence of a concurrence of jurisdiction. If, therefore, it were true, that the commissioner, in issuing a warrant for the seizure of a fugitive slave, acted as a court, and exercised a part of the judicial power of the United States, the negation of all authority in the State courts to interfere with the execution of the process might be referred to the doctrine just stated. But the commissioner who issued a warrant for the seizure of a fugitive slave, did not act as a court, or exercise judicial authority. His authority was in its nature judicial, or quasi-judicial, as contradistinguished from judicial authority.

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It is precisely the character of authority which the enrolling officer exercises under the conscript law, when he determines the question of liability to conscription.

Chief-Justice PEARSON, of North Carolina, in the matter of Bryan, before the supreme court of that State, argued against the proposition, that the officer executing the conscript law exercised *quasi-judicial* power, upon the ground that the vesting of such authority in an officer would break down the distinction, which the constitution carefully draws, between the executive and judicial departments of government. In this argument, it seems to me, the learned chief-justice overlooks the difference between judicial authority, and that which is *quasi-judicial*, or merely judicial in its nature. The bestowment of any part of the judicial authority of the United States, upon an officer appointed and qualified as were the commissioners who were empowered to issue warrants for the seizure of fugitive slaves, and to authorize their return to the States from which they escaped, would have infringed the provision of the constitution which prescribes the mode of appointing judicial officers, and their tenure; and the proceedings before such commissioners would probably have been violative of the constitutional provision on the subject of jury trials. The constitutionality of the fugitive-slave law can only be maintained upon the ground, that the commissioner is not a judicial officer, and does not exercise judicial power. Upon that ground, it has been maintained by the courts of the United States, and by some of the State courts.—*Prigg v. Commonwealth*, 16 Peters, 622; Opinion of Judge Cheves, of South Carolina, in Rhodes' case, 12 Niles' Register, 264; Charge of Judge Nelson to the grand jury for the southern district of New York, 1 Blatchford, 635, 643, 644; *Ex parte Robinson*, 6 McLean, 355, 359; Sims' case, 7 Cush. 302-303; *Ex parte Jenkins*, 2 Amer. Law. Reg. 149; *Ex parte Gist*, 26 Ala. 156. See, also, *United States v. Ferreira*, 18 Howard, 40, 51; *Gaines v. Harvin*, 19 Ala. 498.

I make the following extract from the above mentioned

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charge of Judge Nelson: "It has been made a question upon this act [the fugitive-slave law], whether or not it was competent for congress to confer the power upon the United States commissioners to carry it into execution. As the judicial power of the Union is, by the constitution, vested in the supreme court, and in such inferior courts as congress may from time to time establish, the judges of which shall hold their offices during good behaviour, it has been supposed that the power to execute the law must be conferred upon these courts, or upon judges possessing this tenure. It is a sufficient answer to this suggestion, that the same power was conferred upon the State magistrates by the act of 1793; and which, in *Prigg v. Commonwealth of Pennsylvania*, was held to be constitutional, by the only tribunal competent under the constitution to decide that question. * * *

The judicial power mentioned in the constitution, and vested in the courts, means the power conferred upon courts ordained and established by and under the constitution, in the strict and appropriate sense of that term—courts that compose one of the three great departments of the government, prescribed by the fundamental law, the same as the other two, the legislative and the executive. But, besides this mass of judicial power belonging to the established courts of a government, there is no inconsiderable portion of power in its nature judicial—*quasi-judicial*—invested from time to time, by legislative authority, in individuals, separately or collectively, for a particular purpose and limited time. This distinction in respect of judicial power will be found running through the administration of all governments, and has been acted upon in this since its foundation. A familiar case occurs in the institution of commissions for settling land claims, and other claims against the government. * * * *

The same answer may be given, also, to the objection founded upon the seventh amendment of the constitution, which provides that, in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved. * * * The

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proceeding contemplated by the clause of the constitution in question, is not a suit at common law within the meaning of that amendment. It settles conclusively no right of the claimant to the service of the fugitive, except for the purpose of the removal to the State from which he or she fled; no more than the proceeding in the case of a fugitive from justice, for the purpose of removal, settles his guilt. The question of right to the service in the one case, and of guilt in the other, is open to a final hearing and trial in the States whence the fugitives escaped."

Language equally pointed and clear will be found by reference to the other authorities above referred to. Our own court, in *Gaines v. Harvin*, (*supra*,) used the following language: "We not understand by this provision in the constitution, that it was the intention of its framers to deny to the legislature the power to confide to ministerial officers, who do not constitute a part of the judiciary properly so called, many duties involving inquiries in their nature judicial. The practice of this, as of all other governments having their executive, judicial, and legislative departments separate and distinct, very clearly shows that, in the administration of the laws, inquiries partaking of the nature of judicial investigations are confided to persons other than judges, whose acts have never been questioned on constitutional grounds. Auditors and commissioners appointed in certain cases, and for specific but temporary purposes; commissioners of roads and revenue, or for the allotment of dower; the sheriff, in executing writs of inquiry in certain cases; so, also, the masters in chancery, the commissioner of patents of the United States, and commissioners under the late act of congress in regard to the extradition of fugitive slaves, all perform duties in their nature judicial; but we have seen no case holding their acts to be unconstitutional."

If it were true, as argued by Chief-Justice PEARSON, that to confer on the secretary of war and his subordinates the power of determining who is liable to conscription, would be "totally at variance with every principle of our government," then the fugitive-slave law, in its

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bestowment of power upon the commissioners, violated the constitution; and the law investing the registers of land-offices, and every department of the government, with *quasi-judicial* power, is unconstitutional. The authorities which I have cited, as well as those from which I have made extracts, fully illustrate and sustain the distinction which I have drawn; and I need not further discuss the point. I think it can not be controverted, by any one who respects judicial precedents and fair argument, that the commissioner who issued a warrant for the arrest of a fugitive slave, was no judge, held no court, did not exercise judicial authority, issued no process returnable to a court, and really put forth no judicial process; notwithstanding, in the careless use of language, his process may have been so characterized. The commissioner was as much a ministerial, or executive officer, as the officer charged with the execution of the conscript law; and their powers are alike *quasi-judicial*, as distinguished from judicial, in their character. Upon what ground, then, can it be maintained, that the State courts can interfere with the execution of the conscript law, and yet were without power to interfere with the enforcement of the fugitive-slave act?

I proceed to notice some of the decisions and rulings made in the non-slaveholding States by the judges who were endeavoring to maintain the supremacy of the constitution and laws of the United States, opposed and resisted with a boldness and ingenuity without a parallel in the history of the country. Judge Nelson, of the supreme court of the United States, in the charge to the grand jury already referred to, used the following language: "There have been different opinions entertained by the judges of the States as to their power under this writ [the writ of *habeas corpus*] to decide upon the validity of a commitment or detainer by the authority of the United States. But those who have been inclined to entertain this jurisdiction admit that it can not be upheld, where it appears from the return that the proceedings belonged exclusively to the cognizance of the general government.

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This necessarily results from the vesting of the judicial power of the Union in the Federal courts and officers, and from the fourth article of the constitution, which declares that "the constitution and laws of the United States, which shall be made in pursuance thereof, and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, any thing in the constitution or laws of any State to the contrary notwithstanding." If the exclusive power to execute the law is in the Federal judiciary, and the act is to be regarded as the supreme law of the land, and to be obeyed as such, it is difficult to see by what right or authority its execution can be interfered with, through the agency of this writ, by State authorities. Any such interference would seem to be a direct infraction of the constitution. It is proper to say, in order to guard against misconstruction, that I do not claim that the mere fact of the commitment or detainer of a prisoner by an officer of the Federal government bars the issuing of the writ, or the exercise of power under it. Far from that. Those officers may be guilty of illegal restraints of the liberty of the citizen, the same as others. The right of the State authorities to inquire into such restraints is not doubted; and it is the duty of the officer to obey the authority by making a return. All that is claimed or contended for is, that when it is shown that the commitment or detainer is under the constitution, or a law of the United States, or a treaty, the power of the State authority is at an end, and any other proceeding under the writ is *coram non judice* and void. In such a case—that is, when the prisoner is in fact held under process issued from a Federal tribunal, under the constitution or a law of the United States, or a treaty—it is the duty of the officer not to give him up or allow him to pass from his hands at any stage of the proceedings."

Judge McLean, one of the judges of the supreme court of the United States, in reference to a case where a Kentuckian, the owner of slaves, seized them in Michi-

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gan without a warrant, held, that the owner having a warrant issued by a commissioner, or having seized his slaves in the absence of a warrant without a breach of the peace, upon the return of either of those facts, the authority of the State court under a writ of *habeas corpus* would cease, because it would then appear that the prisoner was held under the authority of the constitution and laws of the United States.—*Norris v. Newton*, 5 McLean, 82.

A case is reported in 5th Am. Law Reg. 659, September, 1857, (*Ex parte Sifford Marshall et al.*) which was decided in an able opinion by Judge Leavitt in the district court of Ohio. In that case, some persons had resisted the marshal in the arrest of a fugitive slave. Those persons were arrested under a warrant upon the charge of resisting the officer. An attempt was made to take the prisoners out of the custody of the marshal by virtue of a writ of *habeas corpus* issued by a State judge. For an assault and battery committed in resisting this attempt the marshal and his posse were arrested under a warrant issued by a justice of the peace. A *habeas corpus* was obtained from the district judge; and he, in passing upon the power of a State court to interfere with the custody of prisoners held by the marshal under a warrant, used the following language: "The doctrine seems now to be settled, that a State judge has no jurisdiction to issue a writ of *habeas corpus* for a prisoner in the custody of an officer of the United States, if the fact of such custody is known to him before issuing the writ. And it is well settled, that if, upon the return of the writ, it appears the prisoner is in custody under the authority of the United States, the jurisdiction of the State judge is at an end, and all further proceedings by him are void." The same judge, in an opinion of great ability in another case, in 1856, after examining the authorities, held as follows: "If judicial decisions are entitled to any consideration, it is clearly established that, though it may be competent for a State judge to issue the writ of *habeas corpus* in a case of imprisonment under the authority of a law of the United States, when the fact is made known to him his jurisdic-

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tion ceases, and all subsequent proceedings by him are void."—*Ex parte Robinson*, Am. Law Reg. for August, 1856, vol. 4, p. 617; *Ex parte Robinson*, 6 McLean, 35.

In the celebrated *Sims* case, (7 Cush. 285,) the supreme court of Massachusetts declined to issue a writ of *habeas corpus* for a fugitive slave, claimed in the petition to be free, who had been arrested under a warrant issued by a commissioner. The court, in an opinion delivered by Chief-Justice Shaw, while admitting the general proposition, that a State court "can not issue a writ of *habeas corpus* to bring in a party held under color of process from the courts of the United States, or whose services and the custody of whose person are claimed under authority derived from the laws of the United States," denies the universality of the proposition, and instances the cases of soldiers and sailors held by military and naval officers under enlistments complained of as illegal and void, as exceptions. The distinction intimated can only be maintained upon the supposition, that the principle involved would yield at the judicial will to suit the wants of the case.

Finally, the subject was presented to the supreme court of the United States, in the two cases of *Ableman v. Booth*, and the *United States v. Booth*, in which Chief-Justice Taney delivered the opinion of the court, which is reported in 21 Howard. In one of those cases, the Wisconsin court discharged Booth from imprisonment under a commitment by a commissioner for resisting the execution of the fugitive-slave law. In the other, the court of the same State discharged the same person from imprisonment under a judicial conviction for the same offense. The supreme court of the United States, as will be seen by reference to pp. 523-524, placed its decision upon the ground, that a State court can not interfere with the custody of one held under the authority of the United States. After conceding the right of a State court to ascertain by what authority a prisoner within the confines of its territorial jurisdiction is held, the court uses the following emphatic language: "But after the return is made, and the

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State judge or court judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is *within the dominion and jurisdiction of another government, and that neither the writ of habeas corpus, nor any other process issued under State authority, can pass over the line of division between the two sovereignties.* He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him, and afford him redress. And although, as we have said, it is the duty of the marshal, or other person holding him, to make known by a proper return the authority under which he detains him, it is at the same time imperatively his duty to obey the process of the United States, to hold the prisoner in custody under it, and to refuse obedience to the mandate or process of any other government. And consequently it is his duty not to take the prisoner, nor suffer him to be taken, before a State judge or court, upon a *habeas corpus* issued under State authority. No State judge or court, after they are judicially informed that the party is imprisoned under the authority of the United States, has any right to interfere with him, or require him to be brought before them. And if the authority of a State, in the form of judicial process or otherwise, should attempt to control the marshal, or other authorized officer or agent of the United States, in any respect, in the custody of his prisoner, it would be his duty to resist it, and to call to his aid any force that might be necessary to maintain the authority of law against illegal interference. No judicial process, whatever form it may assume, can have any lawful authority outside of the limits of the jurisdiction of the court or judge by whom it is issued; and an attempt to enforce it beyond these boundaries is nothing less than lawless violence."

It has been objected to the authority of this opinion, first, that the court and the great jurist who delivered it did not really mean what is said; and secondly, that it

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must at all events be treated as an *obiter dictum*—as the opinion of an able lawyer on a question not presented by the facts before the court. In reply to the former objection, I have only to say, that when the case of *Ableman v. Booth* was decided, the supreme court of the United States, with its nine judges, in the high qualities of lofty integrity and profound learning, had no superior, if it had an equal; and it is inconceivable that the language of so important an opinion should have obtained the unanimous sanction of such a tribunal, unless it afforded a true index to its opinions. The second objection is as groundless as the first. The decision of the case in which there had been a conviction and a sentence, might have been put upon the principle, that the judgments of judicial tribunals, within the area of their jurisdiction, are conclusive. In the other case, where there was simply an arrest and commitment by authority of a commissioner, that proposition would not have decided the case; for the authorities hereinbefore cited show, that it is now the established doctrine, however much it may have been controverted in the past, that the commitment of one to answer before a court for an offense does not involve the exercise of judicial power. Although an offender may have been committed by a commissioner, to answer a charge, the truth of the accusation may be investigated on *habeas corpus* issued by a judge of a Federal court, and also by a State judge, if he has a concurrence of jurisdiction.—See particularly the opinion of Judge Grier in the case of *Jenkins and Crosson*, reported in the *Amer. Law Reg.* for January, 1854, p. 144. In order to cover both cases, it was, therefore, necessary for the supreme court of the United States to find some broader principle; and it seems to me that they have laid down the only principle which could have controverted the State jurisdiction in both cases.

But it may be said, that the court should have restricted its doctrine to the very facts of the case, and, instead of announcing the broad and comprehensive principle, that the jurisdiction of the general and State governments are

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as distinct as if separated by visible marks—that neither can cross the line which divides their jurisdictions, and that, therefore, a State tribunal can not interfere with the custody of one held under the authority of the United States—should have emasculated the principle, by adding the proviso, that its application should be confined to cases of imprisonment under the warrant of a commissioner, or under a conviction in a Federal court. It is not right to denounce the statement of a principle as an *obiter dictum*, because it is large enough to cover other cases than those decided. To do so, would banish from the bench the assertion of those comprehensive and leading doctrines which give stability and harmony to jurisprudence, and require the judicial mind always to present principle narrowed down by the facts of the particular case, and therefore unfitted to be a rule of conduct in the affairs of life. The great doctrine stated by the supreme court of the United States was applicable to the cases decided, and controlled their decision. It is, therefore, not an *obiter dictum*.

As the result of my long review of the decisions growing, directly and indirectly, out of the fugitive-slave law, I confidently assume, that the principle which I have asserted is fully supported by them, and that it has the sanction of the supreme court of the United States, which, under the old system of government, would have been a commanding authority. I admit, as I have heretofore done, that many State decisions—in New York, New Hampshire, Massachusetts, Pennsylvania, Maryland, and Virginia—maintained the power of State courts to interfere with the custody of persons held under the authority of the United States. Many of those cases are noticed in my former opinion, and they are collated by Hurd in his work on Habeas Corpus. All the State courts did not decide the same way. The question seems to have been decided both ways in Georgia. So, also, the decisions were contradictory in South Carolina.—Rhodes' case, 12 Niles' R. 264; In the matter of Merritt, 5 Amer. Law Journal, 497. In the former of those cases, Judge Cheves

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delivered an able opinion, controverting the State jurisdiction. In the latter, Judge Nott recognized the jurisdiction, without noticing the point. So, also, in North Carolina, the jurisdiction was exercised without any notice or discussion of the question.—*Ex parte Mason*, 1 Mur. 336. In New Jersey, Judge Southard, speaking for the court, avoids the question of jurisdiction; but for himself remarks, that it would require a “great struggle of feeling and judgment for him to ever arrive at the point where he would be prepared to deny the State jurisdiction.”—*State v. Brearley*, 2 Southard, 555.

In the Federal courts, the jurisdiction of the State courts was never acknowledged. In *Veremaitr's* case it was expressly denied.—*Hurd on Habeas Corpus*, 197. In the case of *Keeler*, (*Hempstead's R.* 306,) it was doubted, if not denied. No American law-writer has conceded the jurisdiction, except Mr. Hurd, whose book was written, in Ohio, in 1858, during the struggle of the State courts, in the non-slaveholding States, to defeat the enforcement of the fugitive-slave act; and who exhibits his own proclivities, by the expression of doubts as to the constitutionality of that act—pp. 648, 649. Chancellor Kent as a judge in New York denied the State jurisdiction, and afterwards in his commentary only yielded the point to a later decision in that State so far as to say, “the question was therefore settled in favor of a concurrent jurisdiction in that case, and there has been a similar decision and practice by the courts of other States”; but there is no evidence that he ever abandoned the views expressed by him from the bench.—*Ferguson's case*, 9 Johns. R. 239; In the matter of *Stacy*, 10 *ib.* 328; 1 *Kent's Com.* 401. Sergeant, in his work on Constitutional Law, (p. 282,) treats the question as unsettled, and contents himself with giving the decisions on both sides of it. In *Duer's Treatise on Constitutional Jurisprudence*, (p. 180,) published in 1856, the subject is thus disposed of: “Under what circumstances, and how far, the judges of the State courts have power to issue a *habeas corpus* and decide on the validity of a commitment or detainer under the au-

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thority of the national government, are questions which have been variously determined in the States, and never definitely settled in the supreme court of the United States, where the ultimate right of determining them resides." In 1842, Conkling's Treatise on the Jurisdiction of the Federal Courts issued from the press. That work, in reference to this subject, employs the following language: "Whether, and if so under what circumstances, the judges of State courts can rightfully exercise this power, are questions which have been variously decided in the courts of the several States. It seems to have been agreed on all hands, however, that, admitting the power to exist, it ought to be exercised with great caution and reserve; and among the advocates of the power it has generally been supposed, that it ought to be limited to the inquiry, whether the court or officer, in virtue of whose process or order the prisoner was confined, had jurisdiction of the case." In this unsettled condition the supreme court of the United States found the question in 1858, when it decided the case of *Ableman v. Booth*. That decision, on account of the high character for learning, integrity and patriotism of the judges, the relation in which the court stood to other tribunals, and the sound reasoning which it developed, ought to have settled the question; and in all probability the point would never again have been agitated, if we had continued to occupy our former relations to the United States. *Tempora mutantur, nos et mutamur in illis.*

Ingenuity may suggest the reply to my argument, that the conscript law bestows no authority to enroll those who are exempt for any of the reasons specified in the law; and that, therefore, the officer who visits conscription on one not liable, does not act under the authority of the government of the Confederate States. To this reply I rejoin, that there is a necessarily implied authority in the officer to determine who are amenable to conscription; for how can he enroll those liable, and exempt those not liable, without determining who belong to the respective classes? The officer, in ascertaining who are

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within the age of conscription, as clearly exercises an authority bestowed by act of congress, as he does in enrolling a man of undisputed liability. A youth is presented to an enrolling officer—his age is doubtful: the law commands the officer to enroll him, if he is eighteen years of age; the officer does not know whether he is of that age; must he, because he is thus uninformed, discharge the young man? He must do so, unless he has authority under the law to investigate the question of age; for, as an officer, he can do nothing for which the law does not afford a warrant. The authority to determine the question of liability to conscription is necessarily involved in the power to conscribe; for there can be no conscription without the ascertainment of its proper subjects. An officer must have the power necessary to discharge his duty. Certainly the officer may err: so may all the officers of the general government—the collector of customs, the post-master-general, the commissioner who commits persons held to have violated the criminal law, and all others who exercise powers which concern the pecuniary interest, the property, or the liberty of the citizen; yet it will scarcely be contended, that it is the province of a State tribunal to visit a controlling authority over those officers, in order to coerce the correction of their errors. One government cannot thus control the officers of a co-ordinate government. If it can, the two governments are not co-ordinate and equal within their proper spheres—the latter is subordinate and inferior to the former.

If the officer charged with the execution of the conscript law has no authority to decide the question of liability to conscription, it is competent for any State officer, authorized to issue a writ of *habeas corpus*, to treat every enrollment as a nullity, and to discharge every man enrolled, when in his judgment there was not a liability. The officer becomes liable to a conviction for false imprisonment, if a State court differs from him upon the question which he is bound to decide. He may have decided and acted precisely as he thought to be right, and

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as the judicial tribunals of the government, whose officer he was, would approve; and yet he may be punished as a criminal, because some judicial officer of another government entertained a different opinion. An army raised in a particular State, and deemed liable to conscription by the executive and judicial departments of the Confederate government, and of the State where it was raised, may, upon reaching some other portion of the Confederacy, find some officer, clothed by the State law with power to issue the *habeas corpus*, whose peculiar views will lead him to disband the army in a day. The tribunals of a single State, differing from those of the Confederate States and of every other State, may utterly subvert the application of the power to raise armies to that State. They may even invite the people from other States, by peculiar rulings, to fly to their jurisdiction as a shelter from the enforcement of the law. It is to be apprehended that our government will not be permitted to pass through its infancy, without experiencing some or all of the ruinous consequences which are (as I believe) probable results of the proposition, that State courts have the jurisdiction claimed for them.

Congress has power, granted by the constitution, to suspend the privilege of the writ of *habeas corpus*, when, in cases of rebellion or invasion, the public safety may require it.—Constitution of the United States, art. I, § 9, ¶ 2; Constitution of the Confederate States, art. I, § 9, ¶ 3. An unavoidable sequence of the proposition, that there is a concurrent jurisdiction in the State tribunals, in reference to the custody of persons held under the authority of the general government, is, that the suspension by congress applies to State courts and judges. Upon the hypothesis of the concurrent jurisdiction, the suspension would be utterly vain and nugatory, unless it affected State tribunals; for, if it were restricted to the tribunals of the general government, an applicant for relief under the writ would only find it necessary to address his prayer to a judicial officer of the State, instead of the Confederate States. I am not prepared to admit, that

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the framers of the constitution ever intended to subject the use of the great remedial writ of *habeas corpus* by the States to the control of another government. *Habeas corpus* is the instrument by which the State tribunals redress wrongs, varied and extensive in their character, which can not affect the general government, either in peace or in war, in times of domestic quietude or rebellion. I do not think that the convention which framed the constitution aimed to bestow any authority to interfere with the use of that writ by the State judges. The object of the States was to delegate only such powers as would enable the government "to do that which either could not be done at all, or as safely and well done by them as by a joint government of all." In the clause in reference to *habeas corpus*, there is a great departure from that prime object, if it be understood to apply to the employment of that writ by the State tribunals.

As the writ of *habeas corpus* was never suspended by the government of the United States before the secession of the southern States, we can find in its annals no decision upon the exact question in hand. Nevertheless, I think Chief-Justice Marshall and Chancellor Kent have announced a principle irreconcilable with the supposition that congress can suspend the issue of the writ by State judges. The former of those two eminent jurists, in *Barron v. The Mayor, &c., of Baltimore*, (7 Peters, 247,) used the following language: "The constitution was ordained and established by the people of the United States, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred upon the government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think necessarily, applicable to the government created by the instrument. They are limitations of power granted in

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the instrument itself; not of distinct governments, framed by different persons, and for different purposes." In the same opinion, the principle is distinctly stated, that no limitation of the action of the government of the United States on the people would apply to the State governments, unless expressed in terms; and that in every inhibition in the 9th and 10th articles of the constitution, intended to act on State power, words are employed which directly express that intent. Chancellor Kent's views upon the same subject are thus expressed: "As the constitution of the United States was ordained and established by the people of the United States for their own government as a nation, and not for the government of the individual States, the powers conferred, and the limitations on power contained in that instrument, are applicable to the government of the United States, and the limitations do not apply to the State governments except in express terms. * * The people of the respective States are left to create such restrictions on the exercise of the power of their particular governments, as they may think proper; and restrictions by the constitution of the United States, on the exercise of power by the individual States, in cases not consistent with the objects and policy of the powers vested in the Union, are expressly enumerated."—See, also, In the matter of Smith, 10 Wend. 449; *Livingston v. Mayor of N. Y.*, 8 *ib.* 85–100; *Barker v. People*, 3 Cow. 636–700; *Murphy v. People*, 2 Cow. 315–320; *Noles v. State*, 24 Ala. 672–690; *Boeing v. Williams*, 17 Ala. 510–516.

While the provision of the constitution implies an authority to suspend the privilege of the writ of *habeas corpus*, it restricts that authority to occasions when, in cases of rebellion and invasion, the public safety may require it; and it likewise restricts judicial authority by a prohibition to relieve under the writ, when there is a constitutional suspension. I can not perceive how this limitation of judicial authority can, consistently with the principle stated by Chief-Justice Marshall and Chancellor Kent, be made to apply to the judicial department of a State

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government. A theory, which necessitates the imposition of such a restriction upon the authority and power of State judges, can not, it seems to me, be correct.

If it be understood that the State judges can not discharge persons held under the authority of the Confederate States, perfect harmony in the operation of the two systems is preserved. Neither the States collide with the general government, when it, in the exercise of its powers, take a person into custody; nor the latter with the States, when exercising their proper judicial functions. And the States will be left, as it was intended they should, in the undisturbed exercise of powers, extending "to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement and prosperity of the State."—Federalist, No. XLV, 216.

The privilege of interfering with the general government, in the execution of its laws, is no compensation to the impaired and wounded sovereignty of the States, for the concession to another power of the authority to suspend the right of their citizens to obtain the writ of *habeas corpus* from their judges.

This question, so far as I have discovered, was noticed in only one of the State conventions, which ratified the constitution of the United States. In the Massachusetts convention, Judge Sumner, discussing the clause as to the suspension of the writ of *habeas corpus*, said: "Congress have only power to suspend the privilege to persons committed by their authority. A person committed under authority of the States will still have a right to the writ."—2 Elliott's Debates, 109.

I concede, and never intended to be understood as controverting, the authority of State courts to inquire into the cause of imprisonment of the citizens of the State. On the contrary, I hold, as do all the authorities, that a State judge ought to take jurisdiction, until he ascertains that the petitioner is held under the authority of the Confederate States; and that as soon as he is so informed, whether by the petition itself, or the subsequent proceed-

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ings, he ought to repudiate the cause.—Ableman v. Booth, *supra*; also, Sims' case, 7 Cush. 285; Watkins' case, 3 Peters, 201; *Ex parte* Passmore Williamson, Amer. Law Register for November and December, 1855, vol. 4, p. 31.

I fully concur with my brother STONE in the conclusion attained by him in the Dudley case. I concur with him, also, in his construction of the law and regulations on the subject of substitution. As far as the question of jurisdiction is concerned, I rest my conclusion upon my own argument, and do not assent to the reasoning which concedes jurisdiction to the State courts in some cases, and denies it in others.

This opinion has been swelled to a great length by the numerous and extended quotations made in it. My apology for this is, that I have felt solicitous to vindicate my position with the bar of the State; and I thought it would be better to make the literal extracts found in this opinion, because many belonging to the profession may not have the time or opportunity to examine the works from which the quotations are made. At the time when I wrote my first opinion, there had been only one or two adjudications upon the subject in the Confederate States. The question has been now, expressly and by implication, passed upon by several of the appellate State tribunals in our Confederacy; and in no case known to me has an appellate State court sustained the doctrine which I maintain. Both of my brother judges differ from me. There has not yet been established a supreme court of the Confederacy, which could serve as a common arbiter, to whose decision all would submit. Under the circumstances described, I must treat the question as settled for the present; and although not convinced of any error in my reasoning and conclusions, I shall, so long as those circumstances continue to exist, suffer the State jurisdiction to be exercised to the extent agreed upon by this court, without further controversy.

R. W. WALKER, J.—This case presents the question of the power of the State courts to discharge, on *habeas*

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corpus, persons illegally held in custody by the enrolling officers of the Confederate States, under the asserted authority of the acts of congress popularly known as the "conscript laws." I am strongly inclined to the opinion, that the jurisdiction of the State courts to issue the writ of *habeas corpus*, to bring in persons held as conscripts under the alleged authority of these laws, and to try the lawfulness of their detention, is concurrent and co-extensive with the jurisdiction of the Confederate courts in the premises. At all events, I am thoroughly satisfied, that whenever a person in the custody of an enrolling officer in this State shows that he belongs to any one of the classes of persons expressly "exempted" from military service by the laws of congress; or that, having furnished a substitute, he has obtained a discharge, which is still valid and operative; or that he is not of conscript age; or that, because of non-residence, color, or other legitimate reason, the law of conscription does not apply to him, it is not only the right, but the sacred duty of the judges of the State courts, to discharge him on *habeas corpus*.

The only question necessarily presented, and, as I understand it, the only question actually decided in *Ex parte Hill*, at the last term, (in which I did not sit,) was as to the jurisdiction of the State courts, on *habeas corpus*, to discharge on the ground of physical incapacity, persons in the custody of the enrolling officer, who fail to show that they have been "*held* unfit for military service, by reason of bodily incapacity, under the rules prescribed by the secretary of war." On that question I prefer to withhold an opinion for the present; contenting myself with saying, that if the State courts have no power to discharge in such a case, it must be because a person who has not been "*held* unfit for military service, by reason of bodily incapacity, under the rules prescribed by the secretary of war," is not legally exempt from conscription, although he may be in *fact* unfit for military service on account of such incapacity. If that be so, the enrollment and detention of such a person as a conscript are authorized by law; and consequently, the judges of the Confed-

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erate courts would not, any more than those of the State courts, have power to discharge him on *habeas corpus*.

The application for the prohibition is placed upon the ground, that the probate judge, in issuing the writ of *habeas corpus*, and taking cognizance of the matters therein mentioned, has "acted without authority of law, and usurped jurisdiction of matters which are only cognizable before the judicial or military tribunals of the Confederate States." I think it should be overruled, even if it should appear that the state of facts set forth in the petition for *habeas corpus* does not with complete certainty exclude the idea that the petitioner may be now liable to enrollment. The writ of prohibition ought not to be granted in such a case, unless it is plainly shown that the judge was proceeding to try a question, or exercise an authority, out of his jurisdiction.

As the subject is one of the gravest import, and as the state of my health disables me at present from stating at large the grounds of my opinion as to the existence and extent of the jurisdiction of the State courts, on *habeas corpus*, in cases arising under the conscription laws, I wish to reserve the privilege of preparing and filing hereafter another opinion in this case, in which I will express more fully my views on this interesting and important question.

NOTE BY THE REPORTER.—The foregoing opinion of R. W. WALKER, J., applies only to Armistead's case, and seems to exclude the expression of an opinion in Dudley's case. But Judge W. afterwards instructed the reporter, in publishing the cases, to state that he dissented from the decision of the court in the latter case, unless, in the meantime, he himself prepared and filed another opinion, expressing more fully his views.

EX PARTE McCANTS.

[HABEAS CORPUS.]

1. *Liability of person having substitute in Confederate army to service in State militia.*—A person who, being liable to military service in the army of the Confederate States under the "conscript laws" of congress, procured a discharge from that service by furnishing a substitute in his stead, is nevertheless subject to militia duty under the State laws, and is liable to the draft ordered by the governor on the 17th June, 1863, under the requisition of the president of the Confederate States for seven thousand troops from the militia of this State.

THE petitioner in this case, Allen G. McCants, applied to the probate judge of Montgomery county for the writ of *habeas corpus*, by which he sought to obtain his discharge from the custody of Col. John H. Cogbourn, commanding the 24th regiment of the militia of this State. The facts of the case, as shown by the petition and the return to the writ, which were uncontroverted, are these: In January, 1863, the petitioner, being liable to military duty under the "conscript laws" of congress, procured a discharge from service in the army of the Confederate States, by furnishing a substitute who was accepted in his stead. In June, 1863, the president of the Confederate States made a requisition on the governor of this State for seven thousand troops from the State militia, to be mustered into the service of the Confederate States, within the State of Alabama, for the term of six months. The governor thereupon, on the 17th June, ordered a draft of the State militia.—General orders, No. 10. The draft was held on the 25th July, and the petitioner was drafted as one of the seven thousand troops. On these facts, the probate judge refused to discharge him from custody; holding that his discharge from service in the Confederate States army, as above stated, did not exempt him from liability to service in the State militia under the

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draft. The petitioner then renewed his application before this court, where, by agreement of counsel, the case was argued and submitted on the original papers, without a transcript or bill of exceptions.

A. B. CLITHERALL, for the petitioner.

WM. P. CHILTON, *contra*.

A. J. WALKER, C. J.—[Sept. 2, 1863.]—The president of the Confederate States made a requisition upon the executive of this State, for seven thousand of the militia, to serve within the State, for six months from the first of August. The petitioner was, on the 25th July, drafted as a militia-man under that requisition. Having been previously enrolled as a conscript, he was on the 29th January last discharged, because he had furnished a substitute. The question of the case thus stated is, whether this discharge exempts him from liability to serve the Confederate States as a militia-man; and for the reasons which we proceed to state, we decide it in the negative.

The military strength of the Confederate States is divided into two departments; the army proper, embracing the provisional and permanent organization, and the militia. The army proper has been created by virtue of an authority, bestowed in the constitution, "to raise and support armies." The government employs the militia under the separate and distinct constitutional power "to provide for calling forth the militia, to execute the laws of the Confederate States, suppress insurrections, and repel invasions." The service of the citizen in these two different departments is exacted by the authority of distinct powers, granted in distinct clauses of the constitution.

The government may exercise those different powers for different purposes, and may impose upon citizens, in the two distinct departments, duties altogether variant in their character and objects. There is no restriction upon the employment of the army proper, except such as

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may be implied from the limited powers of our Confederate government. It may be required to serve in an aggressive war in foreign countries, or in building or garrisoning fortifications in times of peace; or to do any other military duty, which the government may legitimately impose. The militia, however, can be called forth only for the three purposes specified in the constitution, of executing the laws, suppressing insurrections, and repelling invasion. It may happen, that the soldier in the army proper, and the militia-man, may be engaged in the same service; but the obligations of the former, and the scope of his duties, are by far the more extensive, and his service may be more perilous and arduous, more distant and protracted.

The same citizen can not render actual service, simultaneously, in both the military departments; and, therefore, the government can not require it. But it has the constitutional authority to exercise, in reference to any citizen, of the proper capacity and age, either of its distinct powers, and to require his service in either of its military departments. The forbearance of the government to reach and take any citizen, or given class of citizens, by the exercise of the more enlarged power, can not imply an obligation, or commit its faith, to abstain from the exercise of the other more restricted power. Nor can the cessation of the exercise of the power, whereby the citizen is made to serve in the army proper, bind it not to exercise the other power of calling forth the same citizen, as a militia-man, to do the particular duty specified in the constitution. A discharge from the operation of one governmental power can not be a discharge from another, differing in the extent of the obligations imposed.

Neither the intention of the government to discharge from militia duty, nor the desire of the citizen to be so discharged, can be inferred from the granting of a discharge, when asked, from the army proper. Guided by considerations of clemency, or public policy, the government may yield to solicitations for discharges from the

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army proper, or define conditions upon which they might be granted, for the reason, that, in an emergency, the services of the discharged soldier may still be made available for local defenses, the suppression of social disturbances, and the enforcement of the laws; and the citizen may well be supposed to have reconciled his sense of patriotism with the act of leaving the army, by the reflection that he could still serve the country as a militia-man. It can not, therefore, be successfully contended that the discharge was contemplated, either by the government or by the citizen, as an emancipation from the restricted and specific duties which may be devolved upon the militia. A discharge from the army proper alone can have no effect upon the obligation to render service as a part of the militia.

It may be said, that the petitioner's discharge was not simply from the army as a conscript, but was a general and comprehensive discharge from the military service of the Confederate States; and that, therefore, the argument which we have made has no application to the case. The discharge was granted under the authority of the ninth section of the act of congress, approved April 16th, 1862. That act simply provides, "that persons not liable for duty may be received as substitutes for those who are, under such regulations as may be prescribed by the secretary of war." Interpreting the transaction between the government and the petitioner in the light of the act, it amounts only to this: that the petitioner, by virtue of the law owing service in the army proper, tenders a man to render it in his place; the government accepts him, relieves the petitioner from that particular service, and remits him to his original *status*. He is discharged only from the service which another renders in his place. The government exempts from no duty except that which another binds himself to render as a substitute. It discharges from duty in the army proper, which the law authorized it to exact, and not from the militia service, in which he had no substitute.

Whenever only a portion of those within the militia

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ago are placed in the army proper, the substitutes will be found to consist, to a large extent, of men belonging to the militia. The history of the war now pending will show many instances of the substitution of militia-men. If the petitioner's claim to exemption is well founded, whenever a substitute and the principal belong to the militia, two men are lost to the militia service; the principal, because he has a substitute in the army; and the substitute, because he is in fact in the army. If the government were to take one half the militia as conscripts, and they were to employ the other half as substitutes, there would, upon the argument for petitioner, be no militia, notwithstanding half of them were at home following their accustomed vocations. The argument leads to the absurd and shocking conclusion, that a law, simply extending the privilege of substitution to the people, had converted all those who might, by the aid of friendship or money, procure substitutes, into a privileged class, free from the constitutional obligation to serve the Confederate States in the militia, even though every other person belonging to that arm of the public service was in the army. Such an argument can not be sound.

It is contended, that he who has furnished a substitute, is *constructively* in the army proper, and that he can not be required to render the incompatible service of the militia-man. In certain cases, the law from given premises infers facts, without any regard to their actual existence. These facts are called *constructive*. Thus we have in the law constructive fraud, constructive notice, constructive housebreaking, and the like. The inference of these facts is made upon principles and policy which can not apply here, and their application would lead to the most glaring absurdities. The constructive facts are not presumed to exist for a single purpose; but the law adopts them, and follows them in their consequences. If, then, the principal is constructively in the army for one purpose, the law must accept that fact with all that is consequent upon it. The principal should receive the pay, and all the privileges and exemptions provided by

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the law for the soldier in service; and he should suffer for the desertion, or other misconduct of the substitute. It can not be necessary to argue this point. From the very nature of the thing, the doctrine of construction is incapable of any application to the case. *Qui facit per alium, facit per se*, is a maxim of the law; but it has no pertinency to the question. He who furnishes a substitute, does not serve through his substitute. The latter, on the contrary, serves in his place—is mustered into service, and discharges all the offices of a soldier, as an independent, distinct person, and not as the representative or agent of another. There can be no such thing as doing military duty through an agent. The nature of the service, and the constancy, fortitude, and heroic qualities which it requires, are such as to exclude the idea of any representation by an agent in the army. The principal is always entitled to the agent's earnings in the business of the agency; and therefore, if the substitute were but an agent, the principal should receive the pecuniary compensation, and the higher rewards of honor, and fame, and gratitude, which await the faithful and gallant soldier, and stimulate him to exhibitions of valor.

These reasons, we think, justify the conclusion which we announced at the outset, and which was attained as the result of a consultation, in which all the judges of the court participated.

The petition must be overruled, and the petitioner must pay the costs of the proceeding.

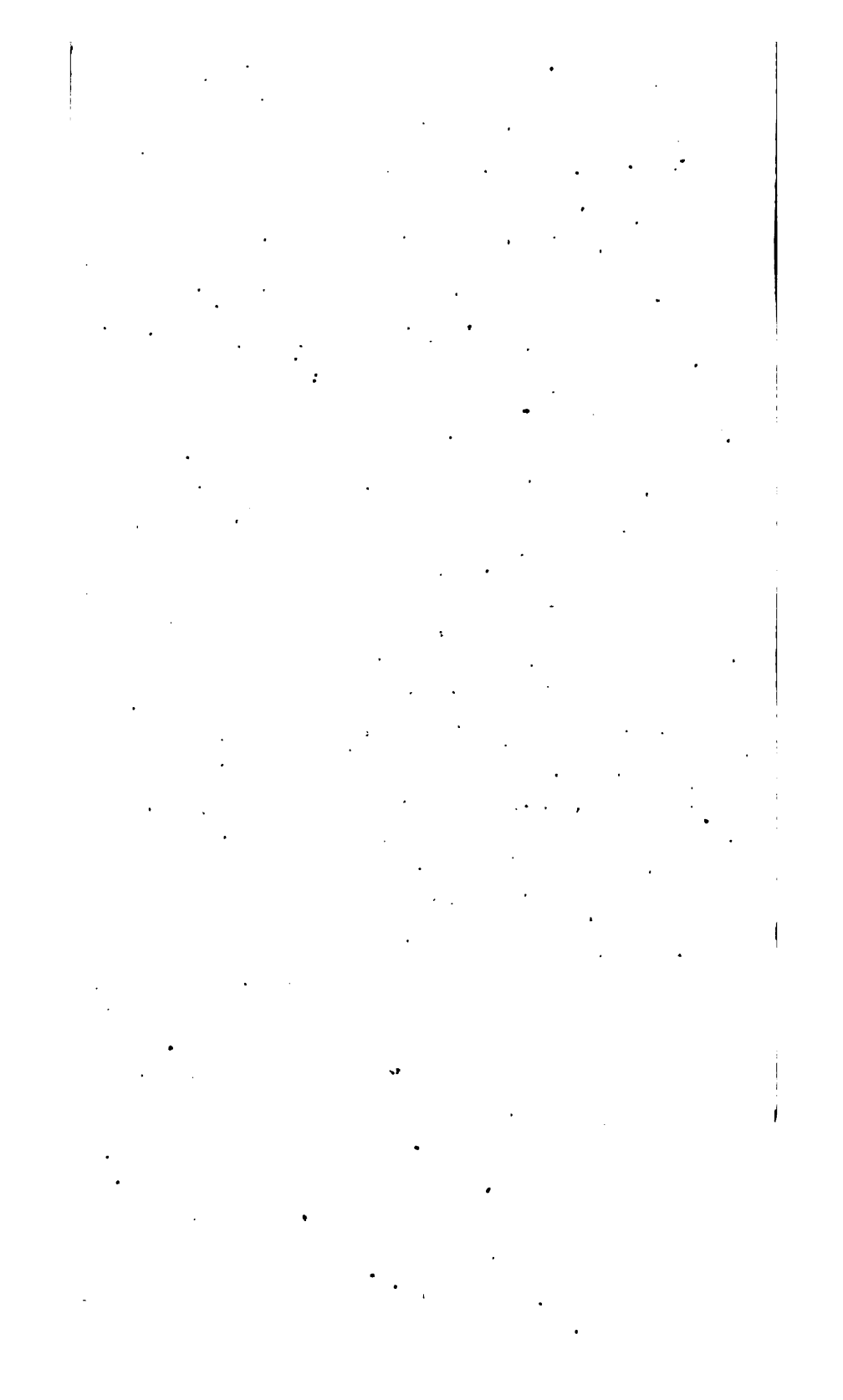
STONE, J.—As I understand the term *militia*, found in the 15th and 16th clauses of section 8, article I, of the Confederate constitution, it does not mean *that body of men*, organized under State authority, who are known as State militia. The State might fail to make, or even to provide for, an organization of the militia; and still the right and power of the Confederate government to call “forth the militia to execute the laws of the Confederate States, suppress insurrections, and repel invasions,” would remain unimpaired. Clause 16 reserves “to the

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States respectively the appointment of the officers, and the authority of training the militia, according to the discipline prescribed by congress;" but all other powers are to be exercised by or under Confederate authority. I will not say the State authorities may not, if they will, be employed and aid in calling forth the militia; but such assistance is not necessary to the exercise of this power by the Confederate government. The State is armed with no power to defeat the call, by refusing to respond to it; but congress may disregard State agency altogether in the execution of this power, and provide for a direct call on the people, when either of the exigencies mentioned in the fifteenth clause arises. Congress has, also, the clear right to define and declare what persons shall be subject to militia duty, under the call of the Confederate government; a right which was frequently exercised under the government of the United States.— See Brightly's Digest, tit. "*Militia*."

My construction of the word *militia*, as found in the constitution, is, that it is not confined to any organization; but that its true and exact import is, *that portion of the people who are capable of bearing arms—the arms-bearing population*. This definition of the term will facilitate the solution of many of the disputed questions, which have arisen on the construction of that part of the constitution which provides for calling forth the militia.

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4. *Same; burden of proof on question of negligence.*—Where the bill of lading contains an express stipulation, that the carrier is "not accountable for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima-facie* case of negligence against him; and the onus is then on him to show the exercise of due care and vigilance on

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- his part to prevent the injury; unless the nature of the injury, or of the goods, of itself furnishes evidence that due care and diligence could not have prevented the injury..... 291
5. *Liability of steambot-men, as common carriers, in matter of transshipment of freight.*—A transshipment of freight is only justifiable in cases of necessity, and, if made in the absence of such necessity as constitutes a legal excuse, subjects the carrier to liability for the subsequent loss of the freight on the vessel to which it is transferred; and the mere grounding of a steambot on an inland river, from which she could relieve herself, with safety and convenience, by temporarily placing a part of her cargo on the bank, and afterwards take it on board again and finish her voyage, does not constitute such legal excuse.—*Cox, Brainard & Co. v. Fessenden*..... 419
6. *Competency of plaintiff, in action against common carrier, to prove contents and value of lost baggage.*—In an action against a railroad company, as a common carrier, to recover damages for the loss of a passenger's baggage, the plaintiff may prove the contents and value of his trunk by his own oath.—*Douglass v. M. & W. P. Railroad Co.*..... 506
7. *Hiring of slaves; hirer's authority to punish slave, and liability for abuse of that authority.*—In the absence of qualifying stipulations in the contract of hiring, the hirer acquires the master's authority to inflict reasonable punishment on the slave; and in determining what is a reasonable punishment,—a question which admits of no certain and uniform solution,—regard must be had to the nature of the offense, and to the temper of the slave while receiving the punishment; since obstinacy, refractoriness, or rebelliousness on his part, justifies severer punishment than would otherwise be right and proper.—*Tillman v. Chadwick*..... 333
8. *Same.*—A charge to the jury, asserting that, if the punishment inflicted by the hirer on a slave "was beyond what was right and proper under the circumstances, then the onus was on him to prove that he was authorized by the slave's conduct to whip him thus severely, and beyond what would have been right and proper,"—is calculated to mislead and confuse the jury, and is properly refused..... 363

BILL OF EXCEPTIONS.

1. *Execution.*—A bill of exceptions, which is without date, and which is not shown by the record to have been signed within the time prescribed by the statute, (Code, § 2368,) will be rejected, on motion, as forming no part of the record.—*Union India-Rubber Co. v. Mitchell*..... 317
2. *Contents.*—Where written documents are mentioned in the bill of exceptions, as constituting a part of it, but are neither copied into it, nor described by such identifying features as to leave no room for mistake in the transcribing officer, they cannot be regarded as a part of the bill.—*Garlington v. Jones*..... 196
3. *Practice on motion to establish.*—On motion in the appellate court to establish a bill of exceptions, which the presiding judge of the primary court failed or refused to sign, (Code, §§ 2354-56,) the point, decision, and facts, as a whole, must be correctly stated in the bill; and if written documents are referred to in the bill, as constituting a part of it, but

BILL OF EXCEPTIONS—continued.

- are neither copied into it, nor sufficiently identified to be regarded as part of it, it cannot be established. 796
4. *When nonsuit, with bill of exceptions, may be taken.*—A nonsuit may be taken, with a bill of exceptions, (Code, § 2857,) in consequence of the suppression of the plaintiff's deposition, on motion, before the trial is entered upon.—*Douglass v. M. & W. P. Railroad Co.* 796

BILLS OF EXCHANGE, AND PROMISSORY NOTES.

1. *Note signed by agent, for principal, held prima facie contract of principal.*—A promissory note, beginning thus, "Twelve months after date, we promise to pay," &c.; and signed thus, "For the Montgomery Iron Works, J. S. W., president, S. J. secretary,"—is, *prima facie*, the contract of the principal, and not binding on J. S. W. personally.—*Roney's Adm'r v. Winter* 534
2. *Illegality of consideration of note.*—If the consideration of a note is partly illegal, it avoids the whole note; but the maker, when sued on the note, may nevertheless waive the illegality, and insist on a failure of the consideration.—*Wynne v. Whisenant* 532
3. *Failure or want of consideration of note.*—In an action on a note given for the purchase-money of land, sold by an administrator under an order of the probate court, a defect in the title is no defense to the suit, if the court had jurisdiction to order the sale.—*Watson v. Collins' Adm'r*... 515
4. *Transfer of note.*—By the common law, (which will be presumed, in the absence of evidence to the contrary, to prevail in a sister State,) to transfer the legal title to a promissory note, without delivery, it is necessary that there should be an endorsement on the note itself, or on another paper attached to it.—*Borum v. King's Adm'r*..... 534
5. *Mistake in payee's name in note.*—When a promissory note is, by mistake, made payable to Aaron Formey, instead of Aaron Formby, the latter may sue upon it in his own name, alleging that it was made payable to him by the name therein inserted, and may prove on the trial, by parol evidence, that he was the person intended; and his assignee may sue in like manner, making the same averments and proof. (*Overruling Gayle v. Hudson*, 10 Ala. 116.)—*Taylor v. Strickland*..... 571
6. *Alteration of note by subsequent verbal contract.*—The maker and holder of a promissory note may, by subsequent verbal agreement, founded on sufficient consideration, change the rate of interest which it bears; yet the holder cannot, in a suit on the note itself, recover on such modified contract.—*Hunt's Executor v. Hall*..... 534

BONDS.

1. *Validity and consideration of bond of officer de facto.*—A bond executed by the intendant of an incorporated town, with others as his sureties, which recites that, by virtue of his election as intendant, he "is thereby made *ex officio* a justice of the peace," and is conditioned for the faithful discharge of his duties as such justice, will be upheld as a common-law obligation, (although there is no law requiring the intendant to give bond,) when it appears that he was at least a justice *de facto*, and that

BONDS—continued.

- the bond is supported by a sufficient consideration; and if it was given for the purpose of procuring for the intendant patronage and business as a justice of the peace, and he did receive patronage and business as a justice on the faith and credit of it, it is supported by a sufficient consideration.—*Williamson and McArthur v. Woolf*. 296
2. *Partial satisfaction of bond*.—A deed, executed by the vendor at the request of the purchaser, conveying a part of the land embraced in the title-bond, with covenants of warranty, to a third person, may be accepted by the purchaser as a partial compliance with the condition of the bond; and being so accepted, its admissibility and validity are not affected by a mistake in the description of the land conveyed, nor by the fact that the vendor had no title to that part of the land.—*Bedell's Adm'r v. Smith*. 548
3. *Tender of deed, and eviction, as prerequisites to right of action on vendor's bond*.—Where the vendor has no title, and, for that reason, refuses to make a title when requested, the tender of a deed by the purchaser, to be executed, is not necessary to perfect his right of action on the title-bond; and an actual eviction of the purchaser is not necessary, since his right of action accrues so soon as the bond is broken by a failure to convey 548
4. *Estoppel by bond*.—The sureties on a bond, which recites that the principal obligor "has been duly elected intendant of the town of C., and is thereby made *ex officio* a justice of the peace," are estopped, when sued on the bond for the default of their principal, from alleging that he was not a justice of the peace; it appearing that he was at least a justice *de facto*, and received much business as a justice on the faith and credit of the bond.—*Williamson and McArthur v. Woolf*. 296
5. *Same*.—A delivery bond, executed by the defendant in detinue, which does not recite any fact showing that the defendant had possession of the property at the service of the writ, does not estop him from showing, in defense of the action, that he did not have the possession of the property at that time; nor does the giving of such bond operate an estoppel *en pais* against him.—(Explaining and limiting *Wallis v. Long*, 16 Ala. 788.)—*Miller v. Hampton*. 357

CHANCERY.

I. JURISDICTION.

1. *Equitable attachment; bequest to trustee, for comfort and support of debtor, but not liable for his debts*.—Where a sum of money is bequeathed to a trustee, in trust for a debtor, "not subject to any debt or debts he may have contracted, but for his comfort and support," it may be subjected by equitable attachment (Code, § 2956) to the payment of his existing debts.—*Smith v. Moore*. 342
2. *Dower; mone profits, and measure thereof*.—After dower has been allotted to the widow by the probate court, she may come into equity to recover damages for its detention; and the measure of her damages, where the husband left no descendants, would be one-half of the rent, from the death of her husband, until the assignment of dower.—*McAllister v. McAllister*. 366

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3. *Equitable set-off against claim for mesne profits.*—If the executor carries on the plantation of the deceased husband with the labor of the slaves, pays all the debts and expenses of administration out of the income, thereby saving the entire personal estate for distribution, and distributes to the widow, under an order of the probate court, her distributive share of the residue of such income, this constitutes no defense to the widow's claim for mesne profits; yet, if he acted in good faith, he is entitled to a credit out of the assets for the amount of damages recovered from him by her; and if the amount received by her as a distributee exceeds her proper share, to be ascertained after deducting the amount of her recovery from the entire fund for distribution, he may, under appropriate pleadings, recover the balance from her, and have it adjusted in the suit for mesne profits. 366
4. *Injunction of action at law.*—A court of equity will not enjoin an action at law for a trespass, on the ground that the plaintiff therein is, and was at the time of the alleged trespass, indebted to the defendant on account of other matters, and is insolvent.—*Harrison v. McCrary*. 619
5. *Equitable relief against judgment at law, on ground of discovery.*—After the rendition of a judgment at law against a party, he cannot maintain a bill in equity for a discovery as to matters of purely legal cognizance, without showing a sufficient excuse for his failure to take the proper steps to obtain the discovery, either by bill in equity, or by interrogatories under the statute, while the action was pending.—*McCollum v. Prewitt*. 498
6. *Same, on ground of usury.*—Usury in the note on which a judgment at law is founded, constitutes no ground for equitable relief against the judgment, unless a sufficient excuse is shown for the failure to make the defense at law. 498
7. *Same, on account of surprise, accident, mistake, or fraud.*—A party who seeks equitable relief against a judgment at law, on grounds which were available as a defense at law; and who simply shows that he had a valid defense to the action, and a sufficient excuse for his failure to be present at the trial term, at which the judgment was rendered; but fails to show that he had employed counsel, or summoned witnesses, or taken any other steps to defend the action, although it was pending more than six months before the judgment was rendered,—does not relieve himself from the imputation of negligence, and, consequently, is not entitled to relief. 498
8. *Same, on account of irregular affirmance on certificate.*—The affirmance of a judgment by the supreme court, on certificate, at the term next preceding that to which the appeal is taken, may be corrected on motion, and, consequently, furnishes no ground for equitable relief against the judgment. 498
9. *Partition; liability for rents, and compensation for improvements.*—In a chancery suit for the partition of lands, by analogy to the rule prescribed by statute for real actions at law, (Code, § 2216,) a defendant, who holds possession under color of title; in good faith, will not be charged with rent for more than one year before the commencement of the suit; and he will be allowed compensation for the value of improve-

CHANCERY—CONTINUED.

- ments made by him during such possession, not exceeding the amount of rents charged against him.—*Ormond v. Martin*..... 526
10. *Partnership; when equity will decree dissolution*.—Although the defendants may not have committed such acts of misconduct, or been guilty of such willful violation of the terms of the contract, as would authorize a court of equity to decree a dissolution of the partnership for that cause; yet a dissolution will be decreed, where it appears that they refuse to carry out one of the terms of the articles of partnership, and insist that, in order to conduct the partnership business successfully, that stipulation must be either changed or disregarded; that they have refused to correspond with the complainants, on matters connected with the partnership business; that the state of feeling between the parties justifies the apprehension, that the joint business can be no longer prosecuted to the mutual advantage of all the partners; that there is no partnership property which might be sacrificed by a sale, and that a dissolution would not probably inflict any material injury on either party.—*Meaher v. Cox, Brainard & Co.*..... 156
11. *Same; jurisdiction not affected by stipulation providing for reference to arbitration*.—A stipulation in articles of partnership, providing for a submission to arbitration of all matters of controversy which may arise among the partners, does not take away the jurisdiction of equity to decree a dissolution..... 156
12. *Voluntary executory trust not enforced*.—A court of equity will not enforce, against the grantor or his personal representative, a purely voluntary executory trust in favor of a grand-child.—*Borua v. King's Adm'r.*..... 534
13. *Specific performance of illegal contract*.—A court of equity will not decree the specific execution of a contract which is illegal and void, because in contravention of the policy of the public land-laws, although the party asking it is in possession of the land, and has made valuable improvements.—*Smith v. Johnson*..... 568
14. *Election; proceedings for recovery of legacy*.—Where a residuary legacy contains a clause directing a debt due from the testator to the legatees, arising from the fact that he had made an unauthorized sale of their interest in a trust of land, to be deducted from the amount of the legacy; and some of the legatees are infants, and consequently, incapable of electing to ratify the sale,—the chancery court alone can make an election for them, and is, therefore, the appropriate forum for the settlement of the estate and the ascertainment of the legacies.—*Bush and Wife v. Ouseingham's Executor*..... 527

H. PLEADINGS AND PROCESS.

15. *Who are necessary parties to bill for redemption*.—The heirs-at-law of the deceased purchaser of lands sold under execution, he having died intestate, are necessary parties to a bill for redemption filed by the judgment debtor.—*Bondurant v. Sibley's Heirs*,..... 409
16. *Who are parties defendant*.—A person against whom process is prayed, and who the bill prays may be required to answer, is thereby made a

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- party defendant, notwithstanding the want of appropriate allegations showing his interest in the litigation..... 489
17. *Sufficiency of service*.—Where one of the defendants was described in the original bill as Charles T. Cleveland; and the sheriff returned the subpoena "executed on Charles H. Cleveland, and Charles T. Cleveland not found"; and the bill was afterwards amended by substituting H for T. as the initial letter of the middle name,—*held*, that the service was sufficient, and that the variance was, at most, an immaterial misdescription.—Cleveland v. Pollard... 481
18. *Service of process on infant*.—Personal service of process on an infant, who is under fourteen years of age, is irregular.—Bondurant v. Sibley's Heirs..... 489
19. *Appointment of guardian ad litem for infant defendant*.—The appointment of a guardian ad litem for an infant, who is not at the time a party to the suit, is a nullity; but, after the infant has been made a party, the appointment of a guardian ad litem for him, even if made without any previous service of process, and otherwise irregular, is voidable merely, and not absolutely void; yet such irregular appointment, although it will work a reversal on error of a decree against the infant, and may be vacated by the chancellor on motion, is valid until reversed or set aside; and the subsequent appointment of another guardian, while the former is unrevoked, is void..... 489
20. *Amendment of bill*.—Under the act of Feb. 8, 1858, "amendatory of proceedings in chancery," (Session Acts, 1857-8. p. 230,) any amendment of a bill, either as to parties or averments, which may become necessary to meet the justice of the case, or to meet any state of the proof that will authorize relief, must be allowed by the chancellor, upon such terms as he may deem just and equitable; but the statute does not authorize the allowance of an amendment, which would convert the bill of the wife into the bill of the husband, and enable him to assert a claim barred by the statute of limitations.—King and Wife v. Avery..... 124
21. *Same; filing without leave, and waiver of irregularity*.—An amended bill, or matter of amendment brought forward in a bill of revivor, will be stricken out on motion, if filed without leave previously obtained; but, if no such motion is made, and answers are afterwards filed, treating the amendment as properly made, and it is recognized and acquiesced in, both by the parties and by the chancellor, the appellate court will consider the irregularity as waived.—Bondurant v. Sibley's Heirs.... 489
22. *Statute of limitations to amended bill*.—If a bill is filed, by mistake, in the name of the wife as a feme sole, to recover her interest in slaves which accrued to her before marriage, and which vested in the husband by virtue of his marital rights; and an amended bill is afterwards filed, in the name of husband and wife, after the statute of limitations has barred the husband's right of action,—the statute is a bar to the relief sought, although the statutory bar was not complete when the original bill of the wife was filed.—King and Wife v. Avery..... 124
23. *Multifariousness*.—A bill, filed by a widow, jointly with her only child by her first husband, against the administrator and heirs-at-law of her

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- second husband, asking an account of the hire of certain slaves, in which the widow had a life-estate at the time of her first marriage, during the period of her second husband's possession of them, a partition of the slaves between her and her child, and the recovery of her distributive share of her second husband's estate,—is multifarious, since it asserts separate and distinct rights, in which the complainants have no community of interest.—*Bean v. Bean's Adm'r*..... 265
24. *Dismissal for multifariousness*.—Although the chancellor seldom should, he nevertheless may, *sua sponte*, dismiss a bill for multifariousness; and if the objection really exists, the appellate court will not reverse his decree..... 265
25. *Variance between allegations and proof*.—The bill alleged, that the slave in controversy, in which the complainant claimed a separate estate under a contract between her husband and one J., was sold, conveyed, and delivered by her husband to said J., in consideration of the latter's agreement to become surety for him in a certain law-suit, and to pay whatever judgment might be recovered against him; "and that whatever might be left of the value of the negro, and her hire, after satisfying the judgment that might be recovered against B. (the husband), and the girl herself, if she was not taken to satisfy the judgment, J. was to convey to, and settle upon complainant, in her own right, and as her own sole and separate estate, and to her heirs." The proof was, that B. delivered the slave to J. to indemnify him against his liability as surety for the costs of the law-suit, "upon condition that, if the suit should go against B., the negro was to be sold, and the proceeds of sale to be first applied to the payment of the costs of the suit, if necessary, and the residue, if any, to be paid over to the complainant; but, in the event that B. gained the suit, the negro was to be put in the possession of the complainant, as her own and separate property, and J. was to transfer to her all the title, interest and claim that he had to the negro, for her separate use and benefit." *Held*, that there was a fatal variance between the allegations and proof.—*Burns v. Hudson*..... 321
26. *Same*.—So, where the bill alleged, that J., in pursuance of his previous contract with B., verbally sold and delivered the slave to the complainant as her separate estate, in consideration of her promise to secure and indemnify him against his liability as surety for B. in the law-suit; while the proof only showed, that he delivered the slave to her, and said that he made no further claim to the slave,—the variance was held fatal..... 321
27. *Same*.—So, where the bill alleged, that the complainant afterwards delivered the slave to the defendant, upon his promise and agreement to indemnify J. against his liability as surety for B., to satisfy whatever judgment might be recovered against B., to keep the slave hired out at a specified price, to return her to the complainant after it was ascertained what he had to pay on the judgment against B., if the negro was not taken to satisfy the judgment, and to account for her hire; while the proof showed, that the defendant's agreement was, to take the place of J. as surety for B., and to dispose of the slave, at the termination of

CHANCERY—CONTINUED.

- the suit, in like manner as J. was to have disposed of her under his agreement with B., as above stated,—the variance was held fatal. 327
28. *Dismissal without prejudice.*—The complainant in this case being a married woman, suing by her next friend, and there being a fatal variance between the allegations and proof, the bill was dismissed without prejudice. 321
29. *Dismissal for want of prosecution.*—Where the complainant refuses, after his bill has been pending for several years, to pursue the course suggested by the chancellor, and which is the only proper course, to bring in a party, who, though made a defendant, has not been brought before the court, the bill may be dismissed, on motion, for want of prosecution; and the complainant cannot excuse his negligence in failing to proceed against the absent defendant, on the ground that he was not a necessary party to the bill. Where the complainants are infants, suing by their next friend, the more usual, and, ordinarily, the proper practice, is to remove the next friend; yet, if the chancellor, in the exercise of his discretion, dismisses the bill, the appellate court will presume that he did so because the interests of the infants did not require a further prosecution of the suit.—*Bondurant v. Sibley's Heirs.* 439
30. *Dissolution of injunction without dismissal of bill.*—An injunction may properly be dissolved for want of equity, where the allegations of the bill are not sufficient to authorize the interference of the court by injunction, although the bill may be retained for other relief.—*Harrison v. McCrary* 619
31. *Action at law in suits for partition.*—The act of February 8, 1858, "to regulate the practice in partition suits," (Session Acts, 1857-58, page 294,) dispenses with the necessity of an action at law, to settle a controverted question of legal title arising in a chancery suit for the partition of lands.—*Ormond v. Martin.* 526

CHARGE OF COURT.

1. *Abstract charge.*—An abstract charge, or one which is not shown by the record to have been predicated on some evidence before the jury, is properly refused.—*McGuire v. The State.* 69
2. *Same.*—A charge to the jury cannot be considered abstract, when the bill of exceptions recites evidence tending to show the existence of the facts on which it is predicated; and if the record fails to show such evidence, the appellate court will presume that a charge given was not abstract, when the bill of exceptions does not purport to set out all the evidence.—*McLemore v. Nuckolls.* 391
3. *Charge as to construction and effect of other charges.*—Where the court, after having charged the jury orally, gave several charges in writing at the request of the defendant, and then added, "that the jury would receive the written charges, in connection with the charges and law as given and expounded orally from the bench, as the law of the case,"—*Id.*, that this was not erroneous.—*Scott v. The State.* 22
4. *Charge, if correct, must be given as asked.*—Since the statute (Code, § 3355) is peremptory, that a charge to the jury, if correct and not abstract, must be given in the language in which it is asked, the

CHARGE OF COURT—CONTINUED.

- doctrine of error without injury cannot be applied to the refusal of such charge, although the legal proposition embraced in it was substantially enunciated in another charge given by the court.—*Polly v. McCall*, 246
5. *Charges given on request must be taken by jury on retirement*.—When charges to the jury, in writing, are given by the court at the request of a party, it is the duty of the court to allow the jury to take such charges with them on their retirement, and the refusal to do so is error: the statute (Code, § 2355) is mandatory, and not simply directory.—*Miller v. Hampton* 357
6. *Charge misleading jury*.—A charge asked, which is calculated to confuse and mislead the jury, is properly refused.—*Tilman v. Chadwick* 382
7. *Same*.—In an action to recover damages for a breach of promise of marriage, a charge which predicates the plaintiff's right to recover on the proof of a promise and breach thereof, and entirely disregards the evidence adduced by the defendant tending to show a justification of the breach, is erroneous.—*Espy v. Jones* 454
8. *Charge invading province of jury*.—Where it is necessary to infer an additional fact, not proved, from the facts which are proved, a general charge on the evidence is an invasion of the province of the jury, and is, consequently, erroneous.—*Ward v. The State* 65
Also, Smith v. The State 83
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Barker v. Bell 375
9. *Same*.—Where the fact of agency is controverted, and there is any evidence tending to establish it, the sufficiency of that evidence is a question for the jury, under appropriate instructions from the court; and a charge, asserting that the evidence is not sufficient to prove the agency, is erroneous.—*Bank of Montgomery v. Plannett's Adm'r* 178

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3. *Jurisdiction of State courts to discharge person in custody for violation of criminal laws of United States*.—The courts of this State have now (July 9, 1861,) no jurisdiction to discharge from custody a person who was arrested prior to the passage of the ordinance of secession, charged with a violation of the criminal laws of the United States within the limits of the State of Virginia; the question of his right to be discharged, or his transfer to the proper court in Virginia for trial, appertaining to the jurisdiction of the district court of the Confederate States.—*Ex parte Kelly*. 91
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5. *Jurisdiction of State courts to discharge enrolled conscript from custody of Confederate States officer*.—The courts and judicial officers of the State have no jurisdiction, on *habeas corpus*, to discharge from the custody of an enrolling officer of the Confederate States, on the ground of physical incapacity for military service, persons who have been enrolled as conscripts under the several acts of congress. 637
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7. *Same*.—The commandant of conscripts, at one of the camps of instruction, having vacated, on the ground of fraud, a discharge procured by a person who, being liable to military service under the "conscript laws" of congress, had furnished a substitute in his stead; and the decision of the commandant having been approved by the secretary of war,—a State court or judge has no jurisdiction, on *habeas corpus* or otherwise, to revise and control the action and decision of the commandant, at the instance of the person whose discharge is vacated, on the ground that

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- ex-parte* affidavits were received against him on the trial, or that he was not notified of the time and place of taking testimony, or that he was not allowed an opportunity to cross-examine witnesses. (R. W. WALKER, J., dissenting.)—*Ex parte* Dudley..... 667
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CONTRACTS.

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2. *Justification of breach.*—If a man promises to marry a woman whom he believes to be virtuous and modest, and afterwards discovers that she is

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- loose and immodest, he is justified in breaking his promise; but, to entitle him to a verdict on that ground, the jury must be satisfied that the plaintiff is a loose and immodest woman, that the defendant broke his promise on that account, and that he did not know her character at the time he made the promise..... 454
3. *Damages for breach.*—In an action for a breach of contract,—by which plaintiff agreed to serve defendant, in the capacity of an overseer, for the term of one year, but was discharged, without fault on his part, before the expiration of the year,—if the suit is commenced before the expiration of the year, the plaintiff can only recover unliquidated damages for the breach of contract; and it cannot be assumed, as matter of law, that the stipulated wages for the entire year would be the measure of damages.—*Wright v. Falkner*..... 231
4. *Illegality of consideration.*—If the consideration of a note is partly illegal, it avoids the whole note; but the maker, when sued on the note, may nevertheless waive the illegality, and insist on a failure of the consideration.—*Wynne v. Whisenant*..... 233
5. *Validity of contract made with slave.*—A promissory note, given to a slave, for money borrowed from him by a white man, is void, and will not support an action.—*Martin v. Reed*..... 184
6. *Same.*—Although the sale of any article to a slave, without the consent of the master, specifying the article, is a penal offense under the laws of this State; yet, if the contract has been fully executed, and the property delivered to the slave, it does not lie in the mouth of a third person, when sued by the master for a trespass to the property, to allege the illegality of the contract.—*Sterrett's Executor v. Kaster*..... 404
7. *Validity of contract for benefit of slave.*—If the master knowingly permits his slave to acquire money, and to pay it out to a third person, in a fair business transaction, he cannot afterwards reclaim it; but, if such third person receives and holds the money for the benefit of the slave, and as his bailee, and it is afterwards used, without the knowledge of the master, in purchasing the slave for himself from the master, the contract is void, and does not direct the title of the master.—*Webb v. Kelly*..... 349
8. *Gift to slave.*—There is no statute or rule of law in this State, which prohibits a gift of old clothes, or other articles harmless in their nature, to a slave, without the knowledge or consent of his master; but the title and possession, on the delivery of the articles to the slave, must be referred to the master.—*Devaughn v. Heath*..... 522
9. *Validity of contract contravening policy of public land-laws.*—A contract between A and B, by which it is agreed, that the former shall enter a tract of land, under the graduation act of 1854, (10 U. S. Statutes at Large, 574,) in his own name, but for their joint use and benefit, and that the latter shall furnish the purchase-money,—being in contravention of the policy of that statute, as indicated by the affidavit required of the party making the entry, is illegal and void.—*Smith v. Johnson*... 509
10. *Difference between sale and exchange; validity of sale of slave by unlicensed negro-trader.*—A contract for the exchange of two slaves, of unequal values, is not converted into a sale, by the payment of a sum of money

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- for the difference of value, and the insertion of a money value as the consideration in the bill of sale; and on the other hand, if the transaction was really a sale of one of the slaves, which was void by statute, (Code, §§ 399, 400,) because the vendor was an unlicensed negro-trader, the acceptance of another slave, in part payment of the price, could neither change the nature of the contract, nor render it valid.—*McGehee v. Rump*..... 580
11. *Alteration of written, by subsequent verbal contract*.—The maker and holder of a promissory note may, by subsequent verbal agreement, founded on sufficient consideration, change the rate of interest which it bears; yet the holder cannot, in a suit on the note itself, recover on such modified contract.—*Hunt's Executor v. Hall*..... 634
12. *Implied contract of lunatic*.—An adult person, who is *non compos mentis*, is liable on an implied contract for necessities furnished him, suitable to his estate and condition in life; and where no guardian has been appointed for him, an action for the value of such necessities must necessarily be prosecuted against him personally.—*Ex parte Northington*..... 400

CORPORATIONS.

1. *Judicial notice of free-masons as charitable corporation*.—The courts of this State will take judicial notice of the fact, that the society of free-masons is a purely charitable corporation.—*Burdine v. Grand Lodge of Alabama*..... 385
2. *Competency of corporator as juror, and as witness for corporation*.—The society of free-masons being a purely charitable corporation, a member of the society cannot be said to have the smallest pecuniary interest in the event of a suit to which the society is a party; consequently, he is a competent juror, and a competent witness for the society..... 385
3. *Variance in description of corporation*.—The society of free-masons in this State being incorporated by the name of the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama and its Masonic Jurisdiction," and suing by that name, a charter granted by the "Grand Lodge of the State of Alabama," authorizing the persons to whom it is directed "to form themselves into a regular lodge of ancient free-masons, by the name of Yorkville Lodge No. 121," sufficiently appears to have been issued by said corporation, and the misdescription does not amount to a material variance..... 385
4. *What actions lie against corporation*.—An action of trespass for false imprisonment lies against a corporation, but an action on the case for a malicious prosecution does not.—*Owaley v. Montgomery & West Point Railroad Co*..... 485
5. *Legislative power to alter summary remedy of corporation against defaulting stockholders*.—A summary remedy against defaulting stockholders, given to a corporation by the act of its incorporation, is no part of its corporate franchises, and may be altered or modified by the legislature at pleasure.—*Ex parte N. E. & S. W. Ala. Railroad Company*..... 608
6. *Statutory liability of railroad company*.—In an action against a railroad company, to recover the value of horses run over and killed by the de-

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fendant's engines and cars, if the evidence simply shows that the horses were run over and killed by a train of cars, and that the engineer in charge of the train failed, at the time the accident occurred, to comply with the requisitions of the statute as to blowing the whistle, ringing the bell, reversing the engine, &c., (Session Acts 1857-58, p. 15,) the court is not authorized to charge the jury, that, if they believe the evidence, they must find for the plaintiff: such a charge is an invasion of the province of the jury, who alone could infer from the evidence that the damage was caused by the engineer's neglect of duty.—*Memphis & Charleston Railroad Co. v. Bibb* 630

CRIMINAL LAW.

1. *Homicide; admissibility of character of deceased, as evidence for prosecution.* On a trial for murder, the prosecution cannot adduce evidence of the peaceable character of the deceased, when it has not been assailed by the prisoner.—*Ben v. The State* 9
2. *Same; dying declarations.*—The dying declarations of the deceased, respecting the state of feeling which existed between himself and the prisoner, are not competent evidence for the prosecution 9
3. *Same; confessions.*—The constable who had the custody of the prisoner, a slave, having said to him, "If you did it, you had better confess; it would be best for you to tell the truth; truth is always the best policy; but, if you did not kill him, we don't want you to say so,"—*held*, that there was nothing in these facts to show that the prisoner's confessions, subsequently made to the constable in the same conversation, were elicited through the influence of either hope or fear; and that the confessions were admissible evidence.—*Aaron v. The State* 12
4. *Same; variance in name of deceased.*—Where the indictment alleged the name of the deceased to be Louis Boudet, or Boredet, while his real name was proved to be Louis Burdet, and to be sometimes pronounced as if spelt Bourdet; and the circuit court thereupon charged the jury, "that if his real name was the same, in sound as if written Boudet or Boredet, or so nearly the same that the difference would be but slight, or scarcely perceptible, and he would have been readily known by his name being pronounced as if written Boudet or Boredet, then the variance would not avail the defendant,"—*held*, that the ruling of the court was substantially correct 12
5. *Same; presumption of malice.*—The charge of the court to the jury in this case, as to the presumption of malice in cases of homicide, construed in connection with the fact, indubitably established, that the killing was perpetrated with a deadly weapon, held to contain no error prejudicial to the prisoner.—*Murphy v. The State* 48
6. *Homicide of white person by slave.*—If a slave kills a white person, believing him at the time to be a runaway negro, and being justified by the attendant circumstances in the belief, the degree of the homicide—whether murder, voluntary manslaughter, or involuntary manslaughter—is the same that it would have been if the person slain had been a runaway negro; but the punishment of the offense is that prescribed

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- for such degree of homicide when perpetrated by a slave on a white person.—*Isam v. The State* 93
7. *Same; charge to jury, as to constituents of offense*.—On the trial of a slave, under an indictment for the murder or voluntary manslaughter of a white person, a charge to the jury, asserting that, "if they believed the defendant struck the deceased with no expectation or intention to kill him, and the stroke did kill him, the death was accidental, and the defendant should be acquitted,"—is erroneous, since it assumes that the defendant would be entitled to an acquittal, although the blow was given with the intention to do great bodily harm.—*Scott v. The State* 23
8. *Same; sufficiency of verdict*.—Under an indictment against a slave, charging him, in separate counts, with the murder and voluntary manslaughter of a white person, a general verdict of guilty is sufficient to authorize a judgment and sentence of death. 23
9. *Same; same*.—Under an indictment charging a slave with the voluntary manslaughter of a white person, a conviction may be had for involuntary manslaughter in the commission of an unlawful act.—*Isam v. The State* 93
10. *Forgery; constituents of offense*.—Under an indictment for forgery, a conviction may be had on proof that the prisoner, with intent to defraud, uttered and published as true a forged instrument, knowing it to be forged.—*McGuire v. The State* 69
11. *Same; description of forged instrument in indictment*.—"An instrument of writing, purporting to be an order, drawn by Sister Adeline, on George Battiste, for nine dollars,"—is a sufficient description, in an indictment, of the instrument alleged to have been forged. 69
12. *Larceny in dwelling-house*.—Under section 3170 of the Code, unlike the penal code of 1841, (Clay's Digest, 425, § 55,) a person may be convicted of larceny in a dwelling-house, although he was in the house, at the time of the theft, by the invitation of the owner.—*Point v. The State* 54
13. *Same; variance in name of owner of stolen goods*.—Where the indictment alleged the stolen goods to be the property of *Juli Antoine*, while the proof showed that they belonged to a Frenchman, whose name was *Juli Antelne* in French, and who was "generally called as if his name was spelled *Julee Antoine*,"—*held*, that there was no variance or misnomer. 54
14. *Obtaining money by false pretenses; joinder of counts in indictment*.—In an indictment for obtaining money by false pretenses, if the false pretense is charged, in different counts, to have been made to "C. B. S. and O. L. S., who were at the time members of a mercantile firm of the name and style of S. & S.," to "C. B. S.," and to "C. B. S. and O. L. S.," there is no misjoinder of counts.—*Oliver v. The State* 41
15. *Same; averment of value of property*.—An averment in such indictment, that, by means of the false pretense charged, the defendant obtained "sixty-five dollars in money," is sufficiently definite and certain, without an additional averment of the value of the money. 41
16. *Same; description of written instrument*.—An instrument of writing, purporting in its commencement to be an indenture between two par-

CRIMINAL LAW—CONTINUED.

- ties, reciting that the party of the first part, for a valuable consideration, "has sold, and binds himself to deliver, to the said party of the second part, all of his present crop of cotton now planted, or so much of it as will satisfy his indebtedness to the said party of the second part; that "this conveyance is intended as a security for the payment" of a debt due from the party of the first part to the party of the second part, "which payment, if duly made, will render this conveyance void, and, if default be made in the payment of the above sum, then the said party of the second part, and his assigns, are hereby authorized to sell his certain crop of cotton, or as much of it as will pay all of his dues to the said party of the second part;" and signed and sealed by the party of the first part,—is sufficiently described in an indictment as a "deed of trust," and is admissible in evidence under that description. 41
17. *Adultery; sufficiency of indictment.*—An indictment, charging that a man and a woman "did live in a state of adultery or fornication," but not stating that they thus lived *with each other*, nor otherwise showing that they were guilty of a joint offense, is demurrable for duplicity.—*Manil v. The State*. 66
18. *Gaming; what is public house.*—A lawyer's office is a public house, within the prohibition of the statute against gaming, (Code, § 3243;) and where it consists of two rooms, front and back, connected by a door, in each of which professional business is transacted, the two rooms are equally within the statute.—*Smith v. The State*. 64
19. *Same; conviction on testimony of accomplice.*—Where a witness testifies, that he was present while the several defendants played a number of games with cards; that at the request of one of the players, who did not understand the game well, he sat behind him, and from time to time, during the whole continuance of the games, instructed him how to play; that he took a card, on one or two occasions, from the hand of said unskillful player, and threw it down on the table for him, and, on one occasion, during the momentary absence of said player, played one of his cards for him; and that he was also engaged in reading a part of the time,—the court may refuse to instruct the jury, that said witness was an accomplice, (Code, § 3600,) and that a conviction could not be had on his uncorroborated testimony. 84
20. *Betting at ten-pins; constituents of offense.*—Under the act of 1854, (Session Acts, 1858-4, p. 30,) as amended by the act of 1858, (Session Acts, 1857-58, p. 267,) it is betting at ten-pins, and not merely playing the game, that constitutes the offense; but it is not necessary that the game should be played at one of the places enumerated in section 3243 of the Code.—*Bass v. The State*. 87
21. *Same; conviction on testimony of accomplice.*—A person who engages in the game, and does not participate in the betting, is not an accomplice, within the meaning of section 3600 of the Code, which forbids a conviction on the uncorroborated testimony of an accomplice. 87
22. *Gaming with slave; what constitutes offense; general charge on evidence.*—To constitute the offense of playing cards with a slave or free negro, (Code, § 3256,) a game must be entered upon, and some act done towards its completion, though it is not necessary that the game should be played

CRIMINAL LAW--CONTINUED.

- out; and where the only evidence before the jury is, that the parties were seen seated on opposite sides of a box, each with four or five cards in his hands, while the rest of the pack lay within their reach, with the top card turned face upwards, and that they immediately labeled the cards, on seeing the witness, and said that the slave was telling the defendant's fortune,—a charge to the jury, instructing them that, "if they believed the evidence, they must find the defendant guilty," is an invasion of their province.—*Ward v. The State*, 65
23. *Disturbing religious worship; what constitutes offense*.—To constitute an interruption or disturbance of "an assemblage of people met for religious worship," (Code, § 3257,) it is not necessary that the interruption or disturbance be made during the progress of the religious services; if made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remain in the house, and before a reasonable time has elapsed for their dispersion, the offense is complete.—*Kinney v. The State*, 104
24. *Same*.—To constitute the statutory offense of disturbing religious worship, (Code, § 3257,) the act must be willfully or intentionally done; it is not sufficient that it was done recklessly or carelessly.—*Ellison v. The State*, 61
25. *Same; evidence of character*.—Under an indictment for disturbing religious worship, the defendant has a right to adduce evidence of his good character; but, until he has done so, the prosecution cannot prove his bad character as a disturber of public worship, 61
26. *Same; evidence of other acts of disturbance*.—Evidence of the fact that similar acts of disturbance had been perpetrated by other persons in the same church, without objection or notice on the part of the members, is irrelevant and inadmissible, 61
27. *Willful or malicious mischief; what constitutes offense*.—Malice is a necessary ingredient of the offense denounced by section 3114 of the Code; but, under section 3115, if the act is either willful or malicious, the offense is complete.—*Johnson v. The State*, 72
28. *Same; when witness may give opinion as to value of animal*.—Under an indictment for willfully or maliciously shooting a mule, a witness who was acquainted with the mule both before and after the infliction of the injury, but who has no skill in veterinary or medical science, may state his opinion as to the extent of damage caused by the wound, 72
29. *Keeping restaurant without license; sufficiency of indictment*.—In an indictment for keeping a restaurant without license, (Code, §§ 397, 399,) it is not necessary to allege that the defendant was engaged in the business of keeping a restaurant; it is sufficient to allege that he "did keep a restaurant" without license.—*Huttenstein v. The State*, 64
30. *Negligent treatment of slave; joinder of offenses in indictment*.—An indictment, which charges that the prisoner, being the owner of certain slaves, "did fail to provide them with a sufficiency of healthy food or necessary clothing, or to provide for them properly in sickness or old age," (Code, §§ 3297-98,) is not objectionable for duplicity, although a conviction might be had on proof of negligent treatment in any one of the specified particulars; nor does the joinder of the names of several slaves, in

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- the same count, render it obnoxious to that objection, although a conviction might be had on proof of the negligent treatment of any one of them.—*Check v. The State*..... 107
31. *Same; description of slaves in indictment.*—In such an indictment, slaves whose names are to the grand jurors unknown, may be thus described, if by the use of due diligence their names cannot be ascertained; but, if it is shown on the trial that, at the time the indictment was found, their names were in fact known, or could have been ascertained by due diligence, the defendant will be entitled to an acquittal as to them; yet proof of the single fact that their names were known at the time of the trial, without more, would not entitle him to an acquittal..... 107
32. *Same; election by prosecution.*—Under such an indictment charging the negligent treatment of several slaves, if it should appear on the trial that the offenses as to the several slaves were distinct, it would be the duty of the court to compel an election by the prosecution; yet, if all the slaves are on the same plantation, and the defendant's conduct towards all of them in the aggregate is relied on for a conviction, there is no ground for such compulsory election..... 107
33. *Same; opinion of witness as expert.*—A person who has served in the capacity of an overseer on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave..... 107
34. *Same; relevancy of evidence, as showing quantity of meat furnished to defendant's slaves.*—The indictment having been found in May, 1860, and the prosecution having proved that, in the year 1859, all the meat on the defendant's plantation was consumed by midsummer, and that meat was afterwards supplied to the plantation from his residence,—it is competent for the defendant to prove that, in December, 1858, (outside of the time covered by the indictment,) a specified number of hogs were killed on the plantation, the meat of which was kept there for the use of the slaves..... 107
35. *When indictment lies for breach of duty imposed by contract, and its sufficiency.*—An indictment lies against the lessee of the city water-works of Mobile, for a breach of the public duty imposed on him by his contract with the corporate authorities, in failing to furnish the city with a supply of water; but, since his contract only binds him to supply water to the city from Three-mile creek, and contains no stipulation as to the quality of the water to be supplied, an indictment which simply charges, in effect, that the water supplied by him was not good and wholesome, shows no breach of duty resulting from the contract.—*Stein v. The State*..... 29
36. *Nuisance; when indictment lies, and its sufficiency.*—Selling and furnishing unwholesome and poisonous water to an entire community, is a nuisance, for which an indictment will lie; but, if the indictment does not allege that the defendant, his agents or servants, poisoned the water, or imparted to it its unwholesome quality, it must aver his knowledge of its unwholesome or poisonous quality..... 29
37. *Same; evidence.*—Under an indictment for a nuisance, in selling and furnishing unwholesome water to an entire community, the prosecution

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- may adduce evidence, showing the deleterious effects of the water on particular persons, members of the community, not named in the indictment. 29
38. *Same; admissibility of slave's declarations.*—The declarations of a slave, complaining of sickness, and detailing his symptoms, are competent evidence on the principle of *res gestæ*, as well as from the necessity of the case, though made to a person who is not a physician. 29
39. *Statutory nuisance; trafficking with slaves.*—To authorize a conviction under the act of 1858, "to prevent nuisances and illegal trafficking with slaves," (Session Acts 1857-8, p. 285,) although it is necessary that three respectable witnesses for the State shall testify that the general reputation of the defendant, or that of his house, "as to trading or trafficking illegally with slaves," is bad, it is not necessary that the jury should find that fact to be proved; nor is it necessary for the State to prove the defendant's permission or consent that slaves, &c., should visit or loiter about his premises; nor is it necessary that the defendant should be a licensed retailer. —*Schwartz v. The State.* 75
40. *Same; sufficiency of indictment.*—An indictment under this statute, which charges that the defendant "kept, or was engaged in the keeping of, a public nuisance, by having permitted slaves, or free persons of color, habitually to visit, assemble, or stop at, or loiter about, the house or premises kept or occupied by him,"—is sufficient, being in the form authorized by the third section of the act, and is not violative of any constitutional provision. 75
41. *Retailing spirituous liquors; removal of licensed retailer from county; liability of agent.*—The mere removal of a licensed retailer to another county, neither abrogates his license, nor renders his clerk or agent, who continues to carry on his business, subject to an indictment under the statute. —*Thompson v. The State.* 58
42. *What constitutes offenses of selling liquor to student or minor.*—The statute prohibiting the sale or delivery of liquor to students or minors, (Code, §§ 3280-81,) applies to fermented liquors as well as to vinous or spirituous liquors. —*Merkle v. The State.* 45
43. *Same; opinion of witness, admissibility of.*—A witness who has frequently drunk fermented liquors, and who can distinguish them by their taste, though he has no special knowledge of chemistry, is competent to express an opinion on the question, whether lager beer is or is not a fermented liquor. 45
44. *Sufficiency of indictment, in statement of time.*—In an indictment under the Code, it is not necessary to state the time when an offense was committed, or to allege that it was done before the finding of the indictment. —*McGuire v. The State.* 99
45. *Conclusion of indictment.*—If an indictment concludes "against the peace and dignity of the State of Alabama," it is not necessary that each count in it should so conclude. 99
46. *Joinder of offenses in indictment.*—Two offenses, of the same general nature, and belonging to the same family of crimes, may be charged, in different counts, in the same indictment, where the mode of trial and the nature of the punishment are the same. —*Cowley v. The State.* 59

- Also, *Oliver v. The State*..... 41
- Cheek v. The State..... 107
47. *Sufficiency of indictment*.—A general verdict of guilty, under an indictment charging two offenses, properly joined in different counts, is sufficient to authorize a judgment and sentence for the punishment prescribed for one of the offenses.—*Cawley v. The State*..... 50
48. *Regularity of proceedings presumed, against irregularities of minute-entries in transcript*.—The appellate court will not presume that the prisoner was tried and sentenced without an indictment, simply because the several minute-entries, showing the trial, conviction and sentence, are copied into the transcript before the indictment..... 59
49. *Service of copy of indictment on prisoner*.—If a copy of the indictment, as originally found by the grand jury, is served upon the prisoner while in confinement, (Code, § 3576,) the validity of the service is not affected by the fact that a *nolle-prosequi* had been entered as to one of the counts. *Scott v. The State*..... 23
50. *Change of venue; sufficiency of clerk's certificate to transcript*.—On change of venue in a criminal case, if the clerk's certificate, appended to the transcript, states that it "contains a true and complete transcript of the caption of the grand jury, and a copy of the indictment, with the endorsements thereon, together with the recognizances of the witnesses, and all the orders and judgments held in the case, all of which is as full and complete as the same appears of record,"—this is a substantial compliance with the requirements of the statute, (Code, § 3613.)..... 23
51. *Same; sufficiency of certified transcript; organization of grand jury*.—Where the regular term of the circuit court commenced on the second Monday after the fourth Monday in *October*, which was the eighth day of *November*; and the indictment, as copied into the certified transcript on change of venue, purported to have been returned into court on the ninth day of *November*; while the transcript stated, in its caption, that the grand jury was organized at a term of the court begun and held on the second Monday after the fourth Monday in *November*, which was the sixth day of *December*,—*held*, that the transcript did not show that the grand jury was organized at the regular term of the court; but, if a *wrong* date was inserted in the transcript by a clerical misprision, (there being a reversal of the judgment on other grounds,) the mistake may be corrected before another trial.—*Aaron v. The State*.. 12
52. *When objection to grand jury may be made*.—The objection cannot be raised for the first time in the appellate court, that the record fails to show that the grand jurors were regularly selected and summoned.—*Bass v. The State*..... 87
53. *Competency of juror*.—A mere occupant and tenant, under a yearly letting, of a room used by him as a sleeping apartment, is not a *freeholder*, within the meaning of the statute (Code, § 3583) specifying the grounds of challenge to jurors in criminal cases.—*Aaron v. The State*.. 12
54. *Challenge of jurors*.—In all trials for capital or penitentiary offenses (Code, § 3585,) the State may, at its election, challenge for cause a juror who has a fixed opinion against capital or penitentiary punishments; yet the statute does not impose on the court the duty, *ex mero*

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- motu*, of setting aside a juror for this cause; nor can the prisoner complain if the State waives or forbears to exercise its right of challenge. *Murphy v. The State*..... 48
56. *Oath of petit jury*.—If the jury, in a criminal case, are sworn "well and truly to try the issue joined," this is a substantial compliance with the requisition of the statute, (Code, § 3478,) and is sufficient.—*McGuire v. The State*..... 69
56. *Jurisdiction of State courts to discharge person in custody for violation of criminal laws of United States*.—The courts of this State have now (July 9, 1861,) no jurisdiction to discharge from custody a person who was arrested prior to the passage of the ordinance of secession, charged with a violation of the criminal laws of the United States within the limits of the State of Virginia; the question of his right to be discharged, or his transfer to the proper court in Virginia for trial, appertaining to the jurisdiction of the district court of the Confederate States.—*Ex parte Kelly*..... 91
57. *Jurisdiction of probate judge to revise proceedings of magistrate under peace warrant*.—A probate judge has no jurisdiction, on *habeas corpus* or otherwise, to revise an order made by a justice of the peace, requiring a party to give security to keep the peace, and directing his imprisonment until such security is given; the only mode of revising the act on of the justice, is by an appeal to the circuit court under section 5531 of the Code.—*Ex parte Coburn*..... 117

DAMAGES.

1. *For breach of contract*.—In an action for a breach of contract,—by which plaintiff agreed to serve defendant, in the capacity of an overseer, for the term of one year, but was discharged, without fault on his part, before the expiration of the year,—if the suit is commenced before the expiration of the year, the plaintiff can only recover unliquidated damages for the breach of contract; and it cannot be assumed, as a matter of law, that the stipulated wages for the entire year would be the measure of damages.—*Wright v. Falkner*..... 281
2. *For breach of warranty of soundness of slave*.—In ascertaining the purchaser's damages, resulting from a breach of warranty of the soundness of a slave, proof of the value of the slave a few months after the sale is admissible, as shedding light on the question of value at the time of the sale.—*Stone & Best v. Watson*..... 286
3. *Same; proof of medical bill, as part of damages*.—It is permissible for the purchaser, in an action to recover damages on account of the unsoundness of a slave, to prove at whose request a physician was called in to the slave, and as whose property the physician attended her; but the physician's account for services rendered to the slave, which was paid by the purchaser, is not admissible evidence for him, until it has been proved that the services were rendered as charged, for the treatment of a disease existing at the time of the sale, and that the charges were correct..... 286
4. *For overflowing land*.—In an action to recover damages for overflowing

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- lands, a recovery cannot be had for injuries accruing after the commencement of the suit; but evidence of such injuries is admissible, with a view of affording information to the jury of the consequences of the diversion under similar circumstances before suit brought.—*Polly v. McCall*. 246
5. *In action on attachment bond*.—In an action on an attachment bond, if the attachment was not vexatious as against the defendant in the process, the fact that the attaching creditor was actuated by malice towards a third person, who, though a joint obligor with the defendant in attachment, was not a party to the process, affords no ground for the recovery of vindictive damages.—*Wood v. Barker*. 311
6. *In trespass for injuries to personal property*.—On the execution of a writ of inquiry, after judgment by default, in trespass for taking personal property, the fact that the property was, at and before the levy of the execution, which constituted the trespass complained of, in the possession of the defendant in execution, is competent evidence for the defendant, in mitigation of damages, as tending to show that he acted in good faith in having the levy made.—*Sterrett's Executor v. Kaster*. 404
7. *Same*.—In such case, the judgment by default estops the defendant from showing, even in mitigation of damages, that the plaintiff had not such a title as would authorize a recovery; yet he may show, in mitigation, that the plaintiff was not the owner of the property, as that fact is not necessarily inconsistent with the plaintiff's right to recover. 404
8. *In trespass qu. cl. fr.*—In trespass *quare clausum fregit*, a charge to the jury, asserting that they can not give vindictive damages, "unless they believe from the evidence, that the defendants maliciously entered upon the plaintiff's lands, in a rude, aggravating, or insulting manner," is erroneous, because it improperly restricts the standard of liability.—*Devaughn v. Heath*. 533
9. *In action for breach of promise to marry; admissibility of seduction in aggravation of damages*.—If evidence of seduction can be received, in any case, to aggravate the damages in an action for a breach of promise to marry, it is only where the seduction follows the promise, and is effected by means of it: seduction prior to the promise is not admissible evidence.—*Espy v. Jones*. 454
10. *Same; admissibility of plaintiff's want of chastity in mitigation of damages*.—Acts of fornication, committed by the plaintiff prior to the defendant's promise to marry her, and in which the defendant himself participated, are not admissible evidence for him in mitigation of the damages. 454
11. *On affirmed judgment*.—On the affirmance of a judgment which has been superseded, (Code, § 3032,) the ten per cent. damages should be computed on the amount of the original judgment, and not on that sum with interest thereon up to the time of the affirmance.—*Lawrence v. Jones*. 617

DEEDS.

1. *Consideration*.—Love and affection for a grandson is not a valuable consideration for a deed.—*Borum v. King's Adm'r*. 696

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2. *Description of deed in indictment*.—An instrument of writing, purporting in its commencement to be an indenture between two parties, reciting that the party of the first part, for a valuable consideration, "has sold, and binds himself to deliver, to the said party of the second part, all of his present crop of cotton now planted, or so much of it as will satisfy his indebtedness to the said party of the second part;" that "this conveyance is intended as a security for the payment" of a debt due from the party of the first part to the party of the second part, "which payment, if duly made, will render this conveyance void, and, if default be made in the payment of the above sum, then the said party of the second part, and his assigns, are hereby authorized to sell his certain crop of cotton, or as much of it as will pay all of his dues to the said party of the second part;" and signed and sealed by the party of the first part, —is sufficiently described in an indictment as a "deed of trust," and is admissible in evidence under that description.—*Oliver v. The State*... 41
3. *Delivery or deed necessary to constitute gift*.—At common law, in the absence of an actual delivery of the property itself, a gift could only be consummated by deed, or other instrument under seal; not because the delivery of the deed was held a symbolical delivery of the property, but on the principle of estoppel.—*Connor v. Trawick's Adm'r*..... 258
4. *Admissibility of parol to vary date of deed*.—Parol evidence is admissible, to show that a deed or bond was in fact executed on a different day from that stated in it.—*Miller v. Hampton*..... 357

See, also, FRAUDS, STATUTE OF.

DEPOSITION.

1. *Objection, when made*.—An objection to a deposition, on the ground that no notice was given of the time and place at which it would be taken, cannot (Code, § 2323) be made when the deposition is offered in evidence on the trial.—*McGill v. Monette*..... 285
2. *General objection*.—A separate objection to "each sentence of each deposition," is nothing more than a general objection to each deposition: and if each deposition contains some legal evidence, such objection may be overruled entirely.—*Taylor v. Strickland*..... 571
3. *Objection to interrogatory, when made*.—When a deposition is taken without filing interrogatories, an objection to a question, on the ground that it is leading, must be made at the examination of the witness, and comes too late when made for the first time at the trial.—*Memphis & Charleston Railroad Co. v. Bibb*... 630
4. *Not suppressed because taken before amendment of complaint*.—The fact that the complaint is amended, after depositions have been taken, by striking out the name of one of the plaintiffs, who was dead at the commencement of the suit, is not a sufficient ground for the suppression of such depositions.—*Jemison v. Smith*..... 140
5. *Personal attendance of witness, and suppression of deposition*.—*Smable*, that the act "to compel the personal attendance of witnesses in civil cases," (Session Acts 1857-8, p. 34,) does not apply to a witness who is confined in jail under a judicial sentence; but, if the proper affidavit has been

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- made, and the attendance of the witness can be procured, the deposition ought to be suppressed.—*Webb v. Kelly*..... 349
6. *When deposition of party may be taken.*—When a party is competent to testify in his own favor, his deposition may be taken, as in case of other witnesses.—*Bouffault v. M. & W. P. Railroad Co.*.... 366

DETINUE.

1. *Release of party on detinue bond, and examination as witness.*—The surety on a detinue bond may be released, and examined as a witness for his principal, on the excoitation by the master of a new bond, with other good and sufficient sureties; but it is not permissible to erase the surety's name from the bond, against the objection of the obligee, and substitute the name of another surety in his stead.—*Webb v. Kelly*..... 349

DISCONTINUANCE.

1. *Of summary proceeding.*—A summary proceeding by notice and motion will be discontinued, unless some action is had on the notice at the return term, although the "stay-law" prohibits the rendition of judgment at that term; yet the plaintiff may keep alive his notice, by having it docketed, according to the rule of practice adopted at this term, or by some action of the court continuing its existence.—*Ex parte N. E. & S. W. Railroad Co.*..... 606

DOWER.

1. *Extent of widow's quarantine.*—A plantation, about five miles distant from the town in which the husband resided at the time of his death, from he drew his supplies and derived his entire income, and the superintendence of which constituted his only business, is not so connected with his residence, (Code, § 1359,) as to entitle the widow to the possession or rents thereof, until her dower is assigned. (A. J. WALKER, C. J., dissenting.)—*McAllister v. McAllister*..... 366
2. *Mesne profits, and measure thereof.*—After dower has been allotted to the widow by the probate court, she may come into equity to recover damages for its detention; and the measure of her damages, where the husband left no descendants, would be one-half of the rent, from the death of her husband, until the assignment of dower..... 366
3. *When probate court may assign dower.*—In proceedings before the probate court for an assignment of dower, (Code, §§ 1360–72,) it is no defense to the application, that the lands in which dower is sought, and of which the decedent died seized and possessed, are in the possession of a third person, who claims an undivided half interest in them, under a contract between him and the decedent, by which it was agreed, that the latter should enter the lands, under the graduation act of 1854, in his own name, but for their joint use and benefit, and with money furnished by the former: such contract being illegal and void, the person in possession is not an alienee of the decedent, and the fact that he has made valuable improvements on the land does not take away the jurisdiction of the probate court.—*Smith v. Johnson*..... 506

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ERROR AND APPEAL.

I. WHEN APPEAL LIES.

1. *From probate decree*.—A decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of the administrator of an insolvent estate; which corrects certain supposed errors and mistakes in a former settlement, thereby showing a larger balance in the administrator's hands for distribution among the creditors, and declares the former settlement to be partial only; and by which "it is considered and decreed," that the claims allowed on the former settlement, which were then declared entitled to a dividend of eighty per cent., "be paid in full, and that whatever sums shall remain, after the satisfaction of said allowed claims, be equally divided among the four minor heirs of" the decedent,—has not the requisites of a final decree, and will not support an appeal.—*Watt's Adm'r v. Watt's Distributees*..... 467
2. *From judgment of nonsuit*.—A nonsuit may be taken, with a bill of exceptions, (Code, § 2257,) in consequence of the suppression of the plaintiff's deposition, on motion, before the trial is entered upon.—*Douglas v. M. & W. P. Railroad Co.* 466

II. BOND, AND SURETY FOR COSTS.

3. *Security for costs*.—On appeal from a judgment of the circuit court, dismissing a petition for rehearing after final judgment, (Code, §§ 2407-15,) the surety on the *supercedens* bond, being a party defendant to the judgment appealed from, cannot become a surety for the costs of the appeal; and if there is no other surety for the costs, (Code, § 2041,) the appeal will be dismissed on motion.—*Dav's v. McCampbell*..... 538

III. PRACTICE.

4. *What is reviewable*.—In civil causes, the appellate court will not notice any assignment of error which is not insisted on in the argument of the appellant's counsel.—*McGill v. Monette*..... 285
5. *What is available to plaintiff in garnishment*.—The allowance of a set-off claimed by the garnishee, against the claims admitted by him to be due to the defendant, or to his transferee, is not a matter of which the plaintiff can complain on error, when the record shows that he contested the transferee's right to the claims, and that the jury found the issue in favor of the transferee.—*Union India-Rubber Co. v. Mitchell*, 317
6. *What is available to executor or administrator*.—An executor or administrator can not complain, on error, of the allowance of compensation to the guardian *ad litem* of the infant distributees, on final settlement of his accounts and vouchers, since he is not thereby prejudiced.—*Anderson's Executor v. Anderson's Heirs*..... 613

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7. *Error without injury in admission and subsequent withdrawal of evidence.*—The erroneous admission of evidence, which is afterwards withdrawn from the jury, and which they are expressly instructed by the court not to regard for any purpose, is, at most, error without injury.—*Williams v. Ivey*..... 220
8. *Same, in admission of redundant evidence.*—Where the probate of a will is shown by a transcript from the records of the proper court, duly certified, other parts of the transcript, containing entries relating to the testator's estate, which can have no other effect than to strengthen the conclusion that the will was admitted to probate, are merely redundant evidence; and their admission as evidence is, at most, error without injury.—*Jemison v. Smith*..... 140
9. *Same, in sustaining demurrer to special plea.*—The sustaining of a demurrer to a special plea, if erroneous, is not available to the defendant, when the record shows that he had the full benefit of the same defense under the general issue.—*Kannady v. Lambert*..... 314
10. *Same, in refusal of charge asked.*—Since the statute (Code, § 2853) imperatively requires, that a charge to the jury, if correct and not abstract, must be given in the language in which it is asked, the doctrine of error without injury cannot be applied to the refusal of such a charge, although the legal proposition embraced in it was substantially enunciated in another charge given by the court.—*Polly v. McCall*..... 246
11. *Presumption in favor of ruling of primary court.*—In a probate case, where the correctness of the ruling of the primary court depends on the proof, and the record does not purport to set out all the evidence on which the probate judge acted, the appellate court will presume that his decision was justified by the evidence.—*Ward v. Cameroun's Adm'r*..... 822
12. *Same.*—When a charge is requested, which, on the facts hypothetically stated, asserts a correct legal proposition; but these facts might be met and avoided by proof of other facts, which would render the charge erroneous, if the bill of exceptions does not purport to set out all the evidence, the appellate court will presume, in favor of the ruling of the primary court, that such additional facts were proved.—*McLemore v. Nuckolls*..... 591
13. *Same.*—So, the appellate will presume that a charge given was not abstract, when the bill of exceptions does not purport to set out all the evidence..... 591
14. *Same.*—When no pleas appear in the record, the appellate court will presume that proper pleas were filed to let in the evidence which the primary court admitted.—*Wynne v. Whisenant*..... 282
15. *Same.*—In a criminal case, the appellate court will not presume that the prisoner was tried and sentenced without an indictment, simply because the several minute entries, showing the trial, conviction and sentence, are copied into the transcript before the indictment.—*Cawley v. The State*..... 59
16. *Presumption of injury from error.*—If evidence is erroneously excluded by the primary court, on a single specified ground, the appellate court will presume injury from the error, although it appears that the evi-

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- denes was, *prima facie*, inadmissible on another ground, which, if the objection had there been raised, might have been obviated by the introduction of other evidence.—*Moseley v. Adm'r v. Martin*..... 171
17. *Same*.—Under the Code, (§ 2554,) if plaintiff amends his complaint, after the court has sustained a demurrer to the original, and proceeds to trial on the amended complaint, he does not thereby waive his right to assign as error the judgment on the demurrer, unless the record shows that, in consequence of the amendment, he sustained no injury by that judgment. (Overruling *Sheppard v. Shelton*, 34 Ala. 652, and limiting *Stallings v. Newum*, 26 Ala. 300, to cases commenced before the Code.)—*Williams v. Ivey*..... 220
18. *Damages on affirmance*.—On the affirmance of a judgment which has been superseded, (Code, § 3062,) the ten per cent. damages should be computed on the amount of the original judgment, and not on that sum with the interest thereon up to the time of the affirmance.—*Lawrence v. Jones*..... 617

ESTATES OF DECEDENTS.

1. *Advancements*.—Money, or property, given by a parent to a child, will be presumed to have been intended as an advancement, unless such presumption is repelled by the nature of the gift, or by other evidence showing that it was intended as an absolute gift. To show that an absolute gift, and not a mere advancement, was intended, the contemporaneous declarations of the parent are admissible evidence for the child; "and when the question arises between distributees, there is much reason, as well as authority, in support of the proposition," that the subsequent declarations of the parent, expressive of his intention in parting with the property, are admissible evidence for the same purpose. But in this case, conceding the admissibility of such subsequent declarations, and considering them in connection with the other facts proved, they are not sufficient to show that the primary court erred in deciding that the property was intended as an advancement.—*Autrey v. Autrey's Adm'r*, 542
2. *Same, in case of partial intestacy*.—In cases of partial intestacy, advancements are not required to be brought into hotchpot, (Code, §§ 1582, 1596,) to entitle the parties to share in the property undisposed of by the will.—*Greene's Executor v. Spear and Wife*..... 450
3. *Widow's quarantine*.—A plantation, about five miles distant from the town in which the husband resided at the time of his death, from which he drew his supplies and derived his entire income, and the superintendence of which constituted his only business, is not so connected with his residence, (Code, § 1359,) as to entitle the widow to the possession or rents thereof, until her dower is assigned. (A. J. WALKER, C. J., dissenting.)—*McAllister v. McAllister*..... 346
4. *Statute of non-claim*.—A claim against the estate of a deceased person is barred, unless presented to the personal representative within eighteen months after the grant of letters testamentary or of administration, (Code, § 1883,) notwithstanding the failure of the personal representative to give notice to creditors, as required by the statute.—*Bank of Montgomery v. Plannett's Adm'r*..... 116

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5. *Validity of order of sale by probate court, for division.*—An order of the probate court, for the sale of a decedent's lands for the purpose of division among the heirs, obtained by an administrator *de bonis non* legally appointed, is not rendered void by the prior descent of the land to the heirs, the payment of all the debts, and the distribution of the personality by the administrator in chief; although these facts might constitute good grounds of objection, in the probate court, to the granting of the order.—*Watson v. Collins' Adm'r.*..... 516
6. *Distribution of estate by consent.*—Where the slaves belonging to a decedent's estate remain undivided, after the payment of his debts and the final settlement of the administration on his estate, and are afterwards divided by consent among the several distributees, who execute reciprocal conveyances to each other for their respective shares;—the husband of one of the female distributees thereby acquires a complete equitable title to the slaves allotted to him and his wife; and, on his death, while thus in possession of them, his personal representative is chargeable with them as belonging to his estate.—*Anderson's Executor v. Anderson's Heirs.*..... 618

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ESTOPPEL.

1. *By bond.*—The sureties on a bond, which recites that the principal obligor "has been duly elected intendant of the town of O., and is thereby made *ex officio* a justice of the peace," are estopped, when sued on the bond for the default of their principal, from alleging that he was not a justice of the peace; it appearing that he was at least a justice *de facto*, and received much business as a justice on the faith and credit of the bond.—*Williamson and McArthur v. Woolf.*..... 396
2. *Same, and en pais.*—A delivery bond, executed by the defendant in detinue, which does not recite any fact showing that the defendant had possession of the property at the service of the writ, does not estop him from showing, in defense of the action, that he did not have the possession of the property at that time; nor does the giving of such bond operate an estoppel *en pais* against him.—(Explaining and limiting *Wallis v. Long*, 16 Ala. 788.)—*Miller v. Hampton.*..... 357
3. *By deed.*—At common law, in the absence of an actual delivery of the property itself, a gift could only be consummated by deed, or other instrument under seal; not because the delivery of the deed was held a symbolical delivery of the property, but on the principle of estoppel.—*Connor v. Trawick's Adm'r.*..... 258
4. *By judgment.*—On the execution of a writ of inquiry, after judgment by default, in trespass for taking personal property, the judgment by default estops the defendant from showing, even in mitigation of damages, that the plaintiff had not such a title as would authorize a recovery; yet he may show, in mitigation, that the plaintiff was not the owner of the property, as that fact is not necessarily inconsistent with the plaintiff's right to recover.—*Stewart's Executor v. Kaster.*..... 404

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5. *Conclusiveness of admission under oath.*—When a bill in chancery, under oath, is offered in evidence against the complainant in a subsequent suit, he is not thereby estopped from denying its averments.—*McLemore v. Nuokelle*..... 591

EVIDENCE.

I. ADMISSIBILITY AND RELEVANCY.

1. *Relevancy of evidence on question of negligence by common carrier.*—In an action against a common carrier, to recover damages for injuries to goods shipped by sea, (or where the same matter is relied on as a defense against an action by him to recover freight,) the fact that similar goods, shipped by sea to the port of delivery, usually arrived safe and uninjured, would be admissible evidence against him, as a circumstance tending to show that any damage by breakage was the result of negligence on his part; and *conversao*, the fact that such goods usually arrived in a damaged and broken condition, is admissible evidence for him, as tending to show that the breakage was not the result of negligence on his part. (Explaining and limiting first head-note in *O'Grady v. Julian*, 54 Ala. 38.)—*Steele & Burgess v. Townsend*..... 201
2. *Same, on question of care or negligence in treatment of slave*—One of the questions in the case being, whether the purchaser was guilty of negligence in his treatment of a female slave, during the time she remained in his possession, before he tendered her back to the vendor; and it having been proved that the slave was badly burned, while in his possession, by the accidental explosion of a fluid lamp, whereby her value was greatly impaired, and was afterwards sent by him, by the public stage, to the place of the vendor's residence,—it is permissible for him to prove that the slave violated his orders in using the lamp, and that he was advised by a physician, whom he consulted, that he might send her by the stage with safety.—*Stone & Best v. Watson*..... 226
3. *Proof of value of slave.*—In ascertaining the purchaser's damages, resulting from a breach of warranty of the soundness of a slave, proof of the value of the slave a few months after the sale is admissible, as shedding light on the question of value at the time of the sale..... 236
4. *Same.*—A slave being described in the bill of sale as a seamstress, it is permissible for the purchaser, in an action to recover damages on account of her unsoundness, to prove what would have been her value, if sound, "taking into consideration the fact that she was a good, No. 1 seamstress"..... 236
5. *Same.*—In proving the value of a slave, a witness cannot be allowed to state what her value would be, "if she possessed the qualities which she was reputed to possess."..... 236
6. *Proof of medical bill, as part of damages.*—It is permissible for the purchaser, in an action to recover damages on account of the unsoundness of a slave, to prove at whose request a physician was called in to the slave, and as whose property the physician attended her; but the physician's account for services rendered to the slave, which was paid by the purchaser, is not admissible evidence for him, until it has been proved that the services were rendered as charged, for the treat-

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- ment of a disease existing at the time of the sale, and that the charges were correct. 236
7. *Relevance of evidence in trespass.*—In trespass for an assault and battery, and for false imprisonment, evidence of an arrest and imprisonment without legal process, or under legal process which is void on its face, is relevant and admissible; *scut*, as to evidence of an arrest and imprisonment under process which is not void on its face.—*Williams v. Ivey*. 198
8. *Same, in mitigation of damages.*—On the execution of a writ of inquiry, after judgment by default, in trespass for taking personal property, the fact that the property was, at and before the levy of the execution, which constituted the trespass complained of, in the possession of the defendant in execution, is competent evidence for the defendant, in mitigation of damages, as tending to show that he acted in good faith in having the levy made.—*Sterrett's Executor v. Kast* r. 404
9. *Same, in action for breach of promise to marry; seduction.*—If evidence of seduction can be received, in any case, to aggravate the damages in an action for a breach of promise to marry, it is only where the seduction follows the promise, and is effected by means of it: seduction prior to the promise is not admissible evidence.—*Espy v. Jones*. 454
10. *Same; plaintiff's want of chastity.*—Acts of fornication, committed by the plaintiff prior to the defendant's promise to marry her, and in which the defendant himself participated, are not admissible evidence for him in mitigation of the damages. 454
11. *Same, in action for overflowing land.*—In an action to recover damages for overflowing lands, a recovery cannot be had for injuries accruing after the commencement of the suit; but evidence of such injuries is admissible, with a view of affording information to the jury of the consequences of the diversion under similar circumstances before suit brought. *Polly v. McCall*. 246
12. *Relevance of evidence, in trover, showing time of slave's death.*—In trover by the wife, after the death of the husband, for the conversion of a slave belonging to her statutory separate estate, which went into the defendant's possession under a mortgage executed by the husband without authority of law, and was accidentally drowned while thus in his possession, it is wholly immaterial whether the death of the slave occurred before or after the death of the husband; consequently, the exclusion of evidence bearing on that question is not a matter available on error.—*Patterson v. Flanagan*. 427
13. *Proof of demand by judgment and receipt.*—In an action by the bailee of goods, against the owners of a steambot, for negligence, the fact in issue being, whether the owners of the goods had demanded of plaintiff compensation for the damage sustained; the record of a judgment recovered by them against him, for the injury to their goods, and their receipt for the money paid by him in satisfaction of their demand, are competent evidence to prove the demand.—*McGill v. Mosette*. 235
14. *Redundant evidence.*—Where the probate of a will is shown by a transcript from the records of the proper court, duly certified, other parts of the transcript, containing entries relating to the testator's estate,

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- which can have no other effect than to strengthen the conclusion that the will was admitted to probate, are merely redundant evidence; and their admission as evidence is, at most, error without injury.—*Jamison v. Smith*..... 140
15. *Homicide; admissibility of character of deceased, as evidence for prosecution.*—On a trial for murder, the prosecution cannot adduce evidence of the peaceable character of the deceased, when it has not been assailed by the prisoner.—*Ben v. The State*..... 9
16. *Disturbing religious worship; evidence of character.*—Under an indictment for disturbing religious worship, the defendant has a right to adduce evidence of his good character; but, until he has done so, the prosecution cannot prove his bad character as a disturber of public worship.—*Harrison v. The State*..... 61
17. *Evidence of other acts of disturbance.*—Evidence of the fact that similar acts of disturbance had been perpetrated by other persons in the same church, without objection or notice on the part of the members, is irrelevant and inadmissible..... 61
18. *Proof of nuisance.*—Under an indictment for a nuisance, in selling and furnishing unwholesome water to an entire community, the prosecution may adduce evidence, showing the deleterious effects of the water on particular persons, members of the community, not named in the indictment.—*Stein v. The State*..... 39
19. *Negligent treatment of slaves; relevancy of evidence, as showing quantity of meat furnished to defendant's slaves.*—The indictment having been found in May, 1860, and the prosecution having proved that, in the year 1859, all the meat on the defendant's plantation was consumed by midsummer, and that meat was afterwards supplied to the plantation from his residence,—it is competent for the defendant to prove that, in December, 1858, (outside of the time covered by the indictment,) a specified number of hogs were killed on the plantation, the meat of which was kept there for the use of the slaves.—*Chase v. The State*..... 107

II. ADMISSIONS, CONFESSIONS, DECLARATIONS, RES GESTÆ.

20. *Admissions against interest.*—The declarations of a person who has the possession of slaves, to the effect "that they had been loaned to him by the widow of S., and were held under the will of S., to be returned at her death, to be divided as directed by said will," are competent evidence against a sub-purchaser from him by subsequent contract; so also are his declarations, "that there was a dispute about the title, and he would only sell such title as he got from the sheriff, as he was informed that the heirs of S. would claim them at the death of his widow."—*Jamison v. Smith*..... 140
21. *Admissibility of subsequent declarations, explanatory of admissions.*—Plain iff having proved, that the slaves in controversy were not included by the defendant in the schedule of his taxable property, which was rendered to the assessor on oath, and were included in the schedule of the plaintiff's property, which was given in at the same time by his son, in the defendant's presence; the defendant cannot be allowed, for the purpose of rebutting the presumption arising from this evidence, to prove that

EVIDENCE—CONTINUED.

- he afterwards corrected his schedule, and what reasons he then assigned to the assessor for his former conduct; and the fact that, when first giving in his schedule, "he asked leave of the assessor to correct any mistake, and said something about getting advice," does not affect the principle.—*McGehee v. Mahone*..... 313
22. *Admissibility of party's declarations as evidence for him.*—The declarations of a party are, *prima facie*, not admissible evidence for him; and the fact that a witness, when cross-examined, "for the sole purpose of contradicting him," touching his own declarations at a particular time and place, states "that he cannot answer the question without giving the declarations of the defendant made at the same time," is not, of itself, sufficient to show error in the exclusion of the defendant's declarations.... 313
23. *Declarations explanatory of possession, and against interest.*—Declarations, made by a person who has the possession of a slave, to the effect that he holds under a will, and claims only a life-estate in the slave, are competent evidence on the principle of *res gestæ*, and as admissions against interest, without the production of the will.—*Patterson v. Flanagan*..... 427
24. *Declarations of vendor and his administrator, showing refusal and inability to make title.*—In an action on a title-bond, against the personal representative of the vendor, the declarations of the vendor in his life-time, and of the defendant after his qualification as administrator, showing a refusal and inability on the part of each to make title, are competent evidence for the plaintiff.—*Bedell's Adm'r v. Smith*..... 546
25. *Admissions of cestui que trust admissible against trustee.*—In an action brought by the trustee of a married woman, suing for her use, her admissions are competent evidence against him.—*McIntosh v. Nuckolls*, 591
26. *Admissibility of bill in chancery as evidence in another suit.*—A bill in chancery, sworn to by the complainant, is competent evidence against him in another suit; and the fact that the complainant is a *jure coactor*, suing by her next friend, does not vary the principle..... 591
27. *Conclusiveness of such admission.*—When a bill in chancery, under oath, is offered in evidence against the complainant in a subsequent suit, he is not thereby estopped from denying its averments..... 591
28. *Declarations of grantor, in case of advancements.*—To show that an absolute gift, and not a mere advancement, was intended, the contemporaneous declarations of the parent are admissible evidence for the child; "and when the question arises between distributees, there is much reason, as well as authority, in support of the proposition," that the subsequent declarations of the parent, expressive of his intention in parting with the property, are admissible evidence for the same purpose.—*Autrey v. Autrey's Adm'r*..... 645
29. *Admission of one defendant, in action against two.*—In an action against two defendants, the admission of one, being competent evidence against the maker, cannot be excluded from the jury on motion; his co-defendant must limit their operation by a request for proper instructions to the jury.—*Polly v. McCall*..... 646
30. *Admissibility of declarations as part of res gestæ.*—The declarations of the

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- plaintiff in attachment, to his attorney, as to his reasons for suing out the writ, are admissible evidence, in an action on the attachment bond, as a part of the *res gesta*.—Wood v. Barker. 311
31. *Same*.—The declarations of the vendor of a slave, made "a few days after the sale," to the effect that, if he had known that the slave was not going to Texas, (whither the purchaser had represented that he intended to carry him,) he would not have sold him, are not evidence for the declarant, as a part of the *res gesta*, in a suit involving the validity of the sale.—Webb v. Kelly. 349
32. *Declarations of sick slave*.—The declarations of a slave while sick, as to the nature and symptoms of his disease, are competent evidence on the principle of *res gesta*, as well as from the necessity of the case, although made to a person who is not a physician.—Stein v. The State. 29
Also, Stone & Best v. Watson. 290
33. *Confessions in criminal case*.—The constable who had the custody of the prisoner, a slave, having said to him, "If you did it, you had better confess; it would be best for you to tell the truth; truth is always the best policy; but, if you did not tell him, we don't want you to say so,"—~~that~~; that there was nothing in these facts to show that the prisoner's confessions, subsequently made to the constable in the same conversation, were elicited through the influence of either hope or fear; and that the confessions were admissible evidence.—Aaron v. The State. 12
34. *Dying declarations*.—The dying declarations of the deceased, respecting the state of feeling which existed between himself and the prisoner, are not competent evidence for the prosecution.—Ben v. The State. 9
35. *Books of science*.—Extracts from standard medical books are competent evidence, and may be read to the jury.—Merkle v. The State. 46

III. BURDEN OF PROOF.

36. *On question of negligence by common carrier*.—Where the bill of lading contains an express stipulation, that the carrier is "not accountable for rust or breakage," proof of injury to the goods by breakage nevertheless makes out a *prima-facie* case of negligence against him; and the onus is then on him to show the exercise of due care and vigilance on his part to prevent the injury; unless the nature of the injury, or of the goods, of itself furnishes evidence that due care and diligence could not have prevented the injury.—Steele & Burgess v. Townsend. 201
37. *On question of diligence or negligence by administrator*.—On final settlement of an administrator's accounts, it being shown that a decree was rendered by the probate court in his favor, ordering his predecessor in the administration to deliver up to him certain choses in action belonging to the estate, the onus is on him to prove due diligence in enforcing the delivery of such choses in action; but whether he negligently failed to procure the delivery, or failed to collect them after obtaining the possession, the onus is on his successor to prove the amount which, by the use of proper diligence, he might have collected.—Wilkinson v. Hunter. 225
38. *On question of prescriptive easement*.—If a person divert waters from its

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- natural channel, by means of a ditch and levee on his own lands, and thereby injuriously overflows the lands of an adjacent proprietor; and this injury continues, without increase, for ten years,—the jury may infer from these facts, in the absence of all other evidence, that the use was adverse, and of right.—*Polly v. McCall*..... 246
39. *In proceeding for recovery of legacy*.—In a proceeding before the probate court, after the expiration of eighteen months from the grant of letters testamentary, for the recovery of a residuary legacy, from which is to be deducted, by the terms of the bequest, a debt due from the testator to the legatee, it is incumbent on the legatee, and not the executor, to prove the amount of the indebtedness to him; and unless he makes such proof, and thereby shows that there will be a sufficiency of assets remaining in the hands of the executor to pay all the debts, charges, and prior legacies, he is not entitled to a decree.—*Bush and Wife v. Cunningham's Executors*..... 397
40. *In action on special contract and common counts*.—In an action against an incorporated railroad company, founded on an instrument of writing executed by its secretary and treasurer, which, after acknowledging the receipt of certain notes as a loan to the company, states that the "loan is made on the conditions and terms stated in the resolutions of the board of directors passed on" on a specified day, "and recorded on the minutes,"—the plaintiff cannot recover, either under the common money counts, or under a special count on the contract, without proving the conditions and terms of the loan, either by the production of the resolutions of the board of directors, or other competent evidence; and the fact that the resolutions are in the defendant's possession, does not affect the principle.—*Ala. & Tenn. Rivers Railroad Co. v. Nabors & Gregory*..... 391

IV. MATTERS JUDICIALLY KNOWN.

41. *Courts*.—The courts of this State will take judicial notice of the facts, that the proceedings of courts of ordinary in a sister State, under the constitutional and statutory provisions in evidence in this case, are lamentably loose, and that their records are made up with peculiar carelessness; and will therefore, in construing the records of those courts, adopt such a construction of the language as will be most favorable to the maintenance and regularity of their proceedings, without supplying what is absolutely wanting.—*Jemison v. Smith*..... 140
42. *Sheriff's term of office*.—The supreme court will take judicial notice of the time when a sheriff's term of office expired.—*Ragland & Howell v. Wynn's Adm'r*..... 270
43. *Abbreviations in pleadings*.—The appellate court will take judicial notice of the fact, that the word "adm'r," following the plaintiff's name in the complaint, is an abbreviation for the word *administrator*.—*Moseley's Adm'r v. Mastin*..... 171
44. *Free-masons as charitable corporation*.—The courts of this State will take judicial notice of the fact, that the society of free-masons is a purely charitable corporation.—*Burdine v. Grand Lodge of Alabama*..... 385

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V. OBJECTIONS.

45. *General objection.*—A general objection to evidence, a part of which is admissible, may be overruled entirely.—*Murphy v. The State*..... 48
 Also, *Wood v. Barker*..... 312
Webb v. Kelly..... 349
Sterrett's Executor v. Kaster..... 404
46. *Same.*—A separate objection to "each sentence of each deposition," is nothing more than a general objection to each deposition and if each deposition contains some legal evidence, such objection may be overruled entirely.—*Taylor v. Strickland*..... 571
47. *Objection to interrogatory, when made.*—When a deposition is taken without filing interrogatories, an objection to a question, on the ground that it is leading, must be made at the examination of the witness, and comes too late when made for the first time at the trial.—*Memphis & Charleston Railroad Co. v. Bibb*.... 630
48. *Objection, when made.*—An objection to a deposition, on the ground that no notice was given of the time and place at which it would be taken, cannot (Code, § 2328) be made when the deposition is offered in evidence on the trial.—*McGill v. Monette*..... 285
49. *Waiver of objection to relevancy of evidence.*—When the bill of exceptions shows that, on the trial before the jury, the defendant contended that the plaintiff was not entitled to recover without proof of a particular fact, he will not be heard, in the appellate court, to allege that proof of the fact was irrelevant, but can only insist that the evidence adduced did not constitute a proper legal means of proving the fact... 285
50. *Admission of one defendant, in action against two.*—In an action against two defendants, the admission of one, being competent evidence against the maker, cannot be excluded from the jury on motion: his co-defendant must limit their operation by a request for proper instructions to the jury.—*Polly v. McCall*..... 243
51. *Error without injury in admission and subsequent withdrawal of evidence.*—The erroneous admission of evidence, which is afterwards withdrawn from the jury, and which they are expressly instructed by the court not to regard for any purpose, is, at most, error without injury.—*Williams v. Ivey*..... 220

VI. OPINION.

52. *As to nature and quality of liquor.*—A witness who has frequently drunk fermented liquors, and who can distinguish them by their taste, though he has no special knowledge of chemistry, is competent to express an opinion on the question, whether lager beer is or is not a fermented liquor.—*Merkle v. The State*..... 45
53. *As to value of animal.*—Under an indictment for willfully or maliciously shooting a mule, a witness who was acquainted with the mule both before and after the infliction of the injury, but who has no skill in veterinary or medical science, may state his opinion as to the extent of damage caused by the wound.—*Johnson v. The State*..... 72
54. *As expert.*—A person who has served in the capacity of an overseer

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- on plantations for sixteen months, is competent to give his opinion, as an expert, in reference to the amount of food which is sufficient for a plantation slave.—*Cheek v. The State*..... 107
55. *To what witness may testify*.—A witness may testify that a slave looked sick, although he is neither a physician, nor an expert.—*Stone & Best v. Watson*..... 236

VII. PAROL AND WRITTEN.

56. *Admissibility of parol to vary date of deed*.—Parol evidence is admissible, to show that a deed or bond was in fact executed on a different day from that stated in it.—*Miller v. Hampton*..... 357
57. *Same, to affect bill of sale*.—If the parties to a contract, for the sale or exchange of two slaves, reciprocally execute to each other bills of sale, which show on their face that the transaction was a sale; and an action is afterwards brought on one of these bills of sale, to recover damages for a breach of the warranty of soundness contained therein,—parol evidence is admissible, to show that the contract was in fact an exchange, and not a sale.—*McGehee v. Rump*..... 589
58. *Same, in aid of record*.—A grant of letters of administration on the estate of E. M. deceased, when it appears that there were two persons (father and son) of that name, each leaving an estate in the county to be administered, may be shown by parol to refer to the estate of the son.—*Moseley's Adm'r v. Mastin*..... 171

VIII. PARTIES.

59. *Discovery at law*.—Where interrogatories are propounded to the defendant in an action at law, (Code, §§ 2330–36,) for the purpose of disproving the defense which he sets up, he may accompany his admission of the particular facts called for by the interrogatories with a statement of additional facts in avoidance of them; as where he pleads payment, in an action on an open account due to a partnership, and is asked if the payment was not made to one of the partners alone, in debts due to him from that partner individually, he may state, in connection with his admission of that fact, that the payment was made after the other partner had sold out his interest in the firm, and while the partner to whom it was made was the sole owner of the goods, accounts, &c.—*Crymes v. White & Johnson*..... 428
60. *Proof of correctness of demand by plaintiff's own oath*.—In an action by late partners, on an open account due to the partnership, the defendant having introduced evidence tending to show that, after the dissolution of the firm, he had paid the account to one of the partners, who had bought out the interest of his co-partner, by crediting the amount on debts due to him from that partner individually, the other partner can not be allowed to testify, (Code, § 2313,) in rebuttal, that the partnership was not dissolved when said payment was made..... 473
61. *Examination of parties as witnesses, in appeal case from justice's court*. In appeal cases from a justice's court, where the amount in controversy exceeds twenty dollars, the statute authorizing either party to be a witness in his own behalf, (Code, § 2779,) has no application to suits by or

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against corporations aggregate.—*Ala. & Tenn. Rivers Railroad Co. v. Oaks & Mills*..... 625

IX. PRIMARY AND SECONDARY.

62. *Proof of account*.—Books of account, kept by a deceased clerk, and all other entries or memoranda made in the course of business or duty, by one who would be at the time a competent witness to the fact which he registers, are held competent evidence from the presumed necessity of the case; but the reason of the rule ceases, and the rule itself consequently fails, when it appears that there is other and better evidence of the same facts; as where it is shown to be the custom of a bank to pay out money only on the checks of its depositors.—*Bank of Montgomery v. Plannett's Adm'r*..... 178
63. *Proof of written notice*.—In an action to recover damages for overflowing land, proof of a written notice by plaintiff to defendant, requiring an abatement of the ditch and levee by which the overflow was caused, being collateral to the issue, is within the exception to the general rule in regard to the proof of writings; and the contents of such notice may be proved by oral testimony, without producing the writing, or accounting for its non-production.—*Polly v. McCall*..... 246

X. RECORDS AND JUDGMENTS.

64. *Probate of foreign will; necessity for*.—A foreign will must be proved to have been admitted to probate, before a certified copy of it can be received as evidence of title to personal property, or become admissible evidence under the act of congress of 1790.—*Jemison v. Smith*..... 140
65. *Same; sufficiency and proof of*.—A transcript from the records of a court of ordinary, in Georgia, properly certified under the act of congress of 1790; containing a copy of a will, an affidavit beneath it by one of the subscribing witnesses, purporting to have been made before "J. Thigpen, J. P.," to the effect "that he believes that he assigned his name at the last part of the within instrument of writing;" followed by an entry, stating that B. S. and J. S. were "sworn executors;" and other entries, showing that the persons so appointed discharged several executorial duties, and were recognized by the court as executors,—must, under the constitution and laws of that State, as proved in this case, be regarded as showing the probate of the will, and the appointment and qualification of the executors..... 140
66. *Presumption of probate from lapse of time*.—Authorities cited on the question, whether the probate of a will, nearly sixty years old, would be presumed from lapse of time, under the circumstances of this case.... 140
67. *Admissibility of record as evidence in another suit*.—In detinue for a slave, brought by the vendor against the purchaser,—the material inquiry being, whether the purchase-money was furnished by the defendant, or by the slave himself; and the defendant, for the purpose of showing that the plaintiff, before the sale, "knew that the slave had money, and permitted him to have, use and dispose of it as he pleased," having read in evidence a receipt, by which the plaintiff acknowledged to have

EVIDENCE—CONTINUED.

- received a sum of money, for safe-keeping, from the slave and his mother,—the record of a suit instituted by the defendant, after the sale, in the name of the owner of the slave's mother, (but without his authority or knowledge, and afterwards dismissed by him,) for the recovery of this money from the plaintiff, is not competent evidence for the plaintiff, "to explain said receipt, and to show that the defendant regarded the money as belonging to the slave's mother."—*Webb v. Kelly*..... 349
68. *Same*.—In detinue by the wife's trustee, suing for her use, to recover slaves which he had bought at a sale under mortgage executed by the husband, and which were afterwards seized and sold by the defendant, as sheriff, under execution against the husband; the defendant having introduced evidence tending to show, that the money, with which the plaintiff paid for the slaves, was furnished by the wife, and was in fact, as to the creditors of the husband, his property,—the record of a chancery suit, instituted by the plaintiff individually after his purchase of the slaves at the mortgage sale, for the purpose of foreclosing a mortgage on other slaves executed by the husband; to which suit the defendant was not a party, and in which the plaintiff was charged with certain moneys paid him by the wife, is not competent evidence for the plaintiff, "to show that creditors of the husband had already received the money paid by the wife to the plaintiff:" as to the defendant, it is *res inter alios acta*.—*McLemore v. Nuckolls*... 591
69. *Same*.—In an action by the bailee of goods, against the owners of a steamboat, for negligence; the fact in issue being, whether the owners of the goods had demanded of plaintiff compensation for the damage sustained; the record of a judgment recovered by them against him, for the injury to their goods, and their receipt for the money paid by him in satisfaction of their demand, are competent evidence to prove the demand.—*McGill v. Monette*..... 285

XI. SUBSTANCE OF PROOF, AND VARIANCE.

70. *Variance in description of corporation*.—The society of free-masons in this State being incorporated by the name of the "Most Worshipful Grand Lodge of Ancient Free-masons of Alabama and its Masonic Jurisdiction," and suing by that name, a charter granted by the "Grand Lodge of the State of Alabama," authorizing the persons to whom it is directed "to form themselves into a regular lodge of ancient free-masons, by the name of Yorkville Lodge No. 131," sufficiently appears to have been issued by said corporation, and the misdescription does not amount to a material variance.—*Burdine v. Grand Lodge of Alabama*..... 355
71. *Same, in action on note*.—The maker and holder of a promissory note may, by subsequent verbal agreement, founded on sufficient consideration, change the rate of interest which it bears; yet the holder cannot, in a suit on the note itself, recover on such modified contract.—*Hunt's Executor v. Hall*..... 604
72. *Same, in claim against insolvent estate*.—When an attorney's receipt for a note, placed in his hands for collection, is filed as a claim against his insolvent estate; and the accompanying affidavit of the creditor states,

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- that the attorney failed, through negligence, to present and file the note as a claim against the insolvent estate of the deceased debtor,—proof of the attorney's admission that he had collected the money on the note, and of his promise to pay it, is not competent evidence for the creditor.
- Stabbs v. Beene's Adm'r*..... 556
73. *Same, in description of middle name*.—A misdescription of the initial letter of the defendant's middle name is, at most, an immaterial variance.
- Cleveland v. Pollard*..... 481
74. *Monickie; variance in name of deceased*.—Where the indictment alleged the name of the deceased to be Louis Boudet, or Boredet, while his real name was proved to be Louis Burdet, and to be sometimes pronounced as if spelt Bouredet; and the circuit court thereupon charged the jury, "that if his real name was the same in sound as if written Boudet or Boredet, or so nearly the same that the difference would be but slight, or scarcely perceptible, and he would have been readily known by his name being pronounced as if written Boudet or Boredet, then the variance would not avail the defendant,"—held, that the ruling of the court was substantially correct.—*Aaron v. The State*..... 12
75. *Larceny; variance in name of owner of stolen goods*.—Where the indictment alleged the stolen goods to be the property of Juli Antoine, while the proof showed that they belonged to a Frenchman, whose name was Juli Antoine in French, and who was "generally called as if his name was spelled Jules Antoine,"—held, that there was no variance or misnomer.—*Point v. The State*..... 54

EXECUTION.

1. *What property is exempt from levy and sale*.—If the defendant in execution, being the head of a family, owns but one horse, and no mule or oxen, the horse is exempt from levy and sale under execution, (Code, § 2462,) although said defendant also owns slaves.—*Cook v. Baine*.... 371
2. *Right of defendant in execution to sell or exchange property exempt from levy and sale*.—The act of February 14, 1854, (Session Acts 1853-4, p. 242,) repealing section 2464 of the Code, also repealed the prior act of Feb. 7, (ib. 69,) amendatory of said section; and the repeal of these statutes removed all restrictions on the right of the defendant in execution to sell or dispose of property exempt from levy and sale..... 371
3. *Action by purchaser of exempt property, against officer making levy*.—A purchaser from the defendant in execution, of property exempt from levy and sale, may maintain an action against the sheriff, for a subsequent levy and sale, without making the affidavit required by the statute (Code, § 2466) from the defendant in execution..... 371
4. *Sheriff's right to commissions for execution of process regular on its face, but issued on void judgment*.—A sheriff is not entitled, as against the defendant in execution, to retain his commissions out of the proceeds of the sale of property under an execution regular on its face, but issued on a judgment which is void on account of the incompetency of the presiding judge; although the statute (Code, § 2284) protects him in the execution of such process.—*Wilson v. Sawyer*..... 559

EXECUTORS AND ADMINISTRATORS.

1. *Validity of grant of administration.*—The failure of an administrator to give bond, as required by the order appointing him, renders the grant of administration voidable only, and not absolutely void.—*Ex parte Maxwell*..... 306
2. *Same.*—A grant of letters of administration in chief, when there has been in fact a previous administration, which had terminated by the death of the administrator, (these facts not appearing in the second grant,) is valid as a grant of administration *de bonis non*, and void only as to the excess of authority which it purports to confer.—*Moseley's Adm'r v. Martin*..... 171
3. *Same.*—A grant of letters of administration is not void, on account of the non-existence of assets in this State, if the intestate was an inhabitant of the county at the time of his death, (Code, § 1667;) nor are letters of administration *de bonis non*, granted by the probate court of the county in which the intestate had his domicile at the time of his death, void for want of unadministered assets, (Code, § 1720,) although they might be irregular and revocable.—*Watson v. Collins' Adm'r*.... 515
4. *Plea of ne unques administrator.*—In an action brought by an administrator in his representative character, a plea, alleging facts which show that his letters of administration are void, for want of jurisdiction in the court by which they were issued, is a good plea in bar..... 515
5. *How administrator may or must declare.*—The words "administrator," &c., following the plaintiff's name in the margin of the complaint, are, of themselves, mere *descriptio personæ*; but an averment in the complaint, that the money sued for will, when collected, be assets of the decedent's estate, is sufficient to show that the plaintiff sues in his representative character..... 515
6. *Same.*—The appellate court will take judicial notice of the fact, that the word "*adm'r*," following the plaintiff's name in the complaint, is an abbreviation for the word *administrator*.—*Moseley's Adm'r v. Martin*... 171
7. *Revocation of letters of administration.*—If letters of administration are granted by the probate court, within forty days after the death of the intestate is known, in contravention of the order of preference prescribed by the statute, (Code, §§ 1668-69,) the largest creditor of the estate may proceed to obtain a revocation of such letters; but, to entitle him to make an application for that purpose, he must show that he is the largest creditor of the estate; and he can not complain, on error, of the refusal of his application, when the record does not show that he proved that fact.—*Ward v. Cameron's Adm'r*..... 622
8. *Burden of proof on question of diligence or negligence by administrator.* On final settlement of an administrator's accounts, it being shown that a decree was rendered by the probate court in his favor, ordering his predecessor in the administration to deliver up to him certain choses in action belonging to the estate, the *onus* is on him to prove due diligence in enforcing the delivery of such choses in action; but, whether he negligently failed to procure the delivery, or failed to collect them after obtaining the possession, the *onus* is on his successor to prove the amount which, by the use of proper diligence, he might have collected. *Wilkinson v. Hunter* 225

EXECUTORS AND ADMINISTRATORS—continued.

9. *Liability of administrator for negligence, and proof thereof.*—An administrator is chargeable, on final settlement of his accounts, not with the nominal amount of certain choses in action belonging to the estate, which his predecessor in the administration was ordered to deliver up to him, but with the amount in money which, by the exercise of due diligence, he might have collected on them; he can not be charged with the amount of an account on a third person, bas of such choses in action, merely on proof of the solvency of the debtor; nor with the amount of a decree rendered by the probate court in favor of his predecessor, against a preceding administrator, without proof of the solvency of the defendant in said decree or his sureties; nor with the amount of a judgment rendered in favor of his predecessor, on proof that one of the defendants therein was in possession of a tract of land, the value of which is not shown, and that the other defendant removed from this State before he became administrator, and afterwards returned and sold a tract of land. 925
 10. *Allowance of counsel fees to executor.*—On final settlement of the accounts of an executor or administrator, he is not entitled to a credit for counsel fees paid by him on account of services rendered in contesting a proper charge against him.—*Anderson's Executor v. Anderson's Heirs.* 612
 11. *Allowance of fees to guardian ad litem.*—An executor or administrator can not complain, on error, of the allowance of compensation to the guardian ad litem of the infant distributees, on final settlement of his accounts and vouchers, since he is not thereby prejudiced. 612
- See, also, LIMITATIONS, STATUTE OF, 1.

FRAUD.

1. *What constitutes.*—In an action on a note given for the purchase-money of land, a special plea, averring the vendor's misrepresentations as to a material matter, and consequent injury to the purchaser, but containing no averment that such misrepresentation misled the purchaser, or constituted an inducement to the purchase, or was relied on by him, fails to make out a case of fraud.—*Kannady v. Lambert.* 814

FRAUDS, STATUTE OF

1. *Promise to answer for debt, &c., of another; whether promise is original or collateral.*—In determining whether a parol promise to pay for goods delivered to a third person is within the statute of frauds or not, the decisive question is, to whom was the credit given: if the credit was given altogether to the defendant, his promise is direct and original, and not within the statute; *versus*, if any credit at all was given to the person to whom the goods were delivered.—*Boykin & McCree v. Dohlson & Co.* 862
2. *Same.*—It is the province of the jury, in such case, to determine to whom credit was given; and it is their duty, in deciding that question, to take into consideration the extent of the undertaking, the expressions used, the situation of the parties, and all the other circumstances of the case. The fact that the goods were charged, on the plaintiff's books, to the

FRAUDS, STATUTE OF—*continued*.

- person to whom they were delivered, if unexplained by other circumstances, would be very strong, if not conclusive evidence, that the defendant's promise was collateral; and, on the other hand, the fact that the plaintiff and defendant have both acted as if the credit was given solely to the defendant, if unexplained by other evidence, would be a circumstance strongly tending to show that his promise was direct and original; yet neither of these facts is conclusive, but they are susceptible of explanation, and their weight as evidence must depend upon the circumstances of the particular case. 863
3. *Surety*.—A decree having been rendered against a sheriff and the sureties on his official bond, on final settlement of his accounts as administrator *virtute officii*, a verbal promise by the sureties, made to the plaintiff in the decree, that they would pay an item of costs which, by mistake, had not been taxed, in consideration that he would allow a credit on the decree, which, as they contended, had been rendered for more than was justly due,—is an original undertaking, founded on a new consideration, and is not within the statute of frauds.—*Ragland & Howell v. Wynu's Adm'r*. 270
4. *Fraudulent conveyances; who are creditors or debtors*.—A trustee, under a deed of trust for the benefit of creditors, becomes their debtor from the time he receives money which, by the terms of the deed, ought to be paid over to them, without any subsequent violation of duty on his part, or demand made by them; and the fact that the creditors are non-residents, does not affect the principle.—*McLemore v. Nuckolls*, 691
5. *Validity of voluntary conveyance*.—A contract between husband and wife, by which a separate estate is created in the wife in the future earnings of herself and her domestic servants, is void as to the existing creditors of the husband; and slaves purchased for her by a third person, and paid for with her earnings under such contract, are subject to the existing debts of the husband, like any other property purchased for her with the husband's money. 691

GARNISHMENT.

See ATTACHMENT, 3.

GIFT.

1. *Requisites of*.—At common law, in the absence of an actual delivery of the property itself, a gift could only be consummated by deed, or other instrument under seal; not because the delivery of the deed was held a symbolical delivery of the property, but on the principle of estoppel.—*Connor v. Trawick's Adm'r*. 253
2. *Gift to slave*.—There is no statute or rule of law in this State, which prohibits a gift of old clothes, or other articles harmless in their nature, to a slave, without the knowledge or consent of his master; but the title and possession, on the delivery of the articles to the slave, must be referred to the master.—*Devaughn v. Heath*. 623

GUARDIAN AND WARD.

See PLEADING AND PRACTICE, 3.

HABEAS CORPUS.—See CONSTITUTIONAL LAW, 3, 5, 7—CRIMINAL LAW, 57.

HUSBAND AND WIFE.

1. *Husband's marital rights in and to wife's personally.*—Prior to the adoption of the statutes of this State securing to married women their separate estates, if a slave was given by a father to his married daughter, or was purchased by the daughter at the administrator's sale of her father's estate, and was not in either case settled to her separate use, the husband's marital rights attached, and the slave became his absolute property.—*Burns v. Hudson*..... 321
2. *Same; reduction of wife's choses in action to possession.*—Where the slaves belonging to a decedent's estate remain undivided, after the payment of his debts and the final settlement of the administration on his estate, and are afterwards divided by consent among the several distributees, who execute reciprocal conveyances to each other for their respective shares;—the husband of one of the female distributees thereby acquires a complete equitable title to the slaves allotted to him and his wife; and, on his death, while thus in possession of them, his personal representative is chargeable with them as belonging to his estate.—*Anderson's Executor v. Anderson's Heirs*..... 612
3. *Same; act of 1843 not retroactive.*—The law is settled in this State, that the act of March 1, 1843, securing to married women their separate estates, does not affect the husband's right to reduce to possession his wife's choses in action which accrued prior to the passage of that statute, 612
4. *Adverse possession between husband and wife.*—At common law, the possession of personal property by the wife, during coverture, is the possession of the husband, and cannot ripen into a perfect title in her, as against the husband's administrator, although it is shown that the husband had abandoned her when her possession commenced; that he never afterwards returned to her, and never asserted any claim to the property; and that she held and claimed it, as her own individual property, for a continuous period of more than twenty years.—*Bell v. Bell's Adm'r*..... 463
5. *Husband's rights in wife's statutory separate estate.*—Under the Code. (§ 1932,) the husband has no right or power to mortgage, for his own individual debt, a slave belonging to the wife's statutory separate estate.—*Patterson v. Flanagan*..... 427
6. *Validity of sale, by wife alone, of statutory separate estate; whether action lies to recover agreed price.*—A sale by the wife alone, without the concurrence of her husband, of property belonging to her statutory separate estate, is absolutely void, and passes nothing to the purchaser; and the wife cannot maintain an action at law, in her own name, to recover the value or agreed price of the property.—*Alexander v. Saulsbury*... 436
7. *Contract between husband and wife.*—A contract between husband and wife, by which a separate estate is created in the wife in the future earnings of herself and her domestic servants, is void as to the existing creditors of the husband; and slaves purchased for her by a third person, and paid for with her earnings under such contract, are subject to the existing debts of the husband, like any other property purchased for her with the husband's money.—*McLemore v. Nuckolls*..... 591

INSOLVENT ESTATES.

1. *Filing claim.*—A claim against an insolvent estate, or the affidavit verifying it, must be regarded as *filed*, within the meaning of the statute, (Code, § 1847,) when it is delivered to the probate judge, or to his acting clerk, in his office, to be placed and kept on file; but merely placing it in the office, not with the proper file of papers belonging to the estate, and without bringing it to the notice of the judge or his clerk, is not a sufficient filing.—*Beane's Adm'r v. Phillips, Go'doby & Blevins*. 310
2. *Sufficiency of claim.*—When an attorney's receipt for a note, placed in his hands for collection, is filed as a claim against his insolvent estate, its failure to specify the amount of the note is no objection to the claim provided the amount be shown by other proof.—*Stinbs v. Beane's Adm'r*. 355
3. *Variance in description of claim.*—When an attorney's receipt for a note, placed in his hands for collection, is filed as a claim against his insolvent estate; and the accompanying affidavit of the creditor states, that the attorney failed, through negligence, to present and file the note as a claim against the insolvent estate of the deceased debtor,—proof of the attorney's admission that he had collected the money on the note, and of his promise to pay it, is not competent evidence for the creditor. 355

INTEREST.

1. *On promissory note.*—The maker and holder of a promissory note may, by subsequent verbal agreement, founded on sufficient consideration, change the rate of interest which it bears; yet the holder cannot, in a suit on the note itself, recover on such modified contract.—*Hunt's Executor v. Hall*. 634

JUDGMENTS AND DECREES.

1. *Conclusiveness of judgment as bar.*—Where a promissory note, which had been transferred by delivery, was placed by the transferee in the hands of an agent, with instructions to present it to the maker for payment, and, if the payment was refused, to put it in the hands of an attorney, for collection by suit; and, payment having been refused, the agent sent the note to an attorney, who, not being informed of the name of the real owner, brought suit on it in the name of the agent, and the action was successfully defended, on the plea of set-off against the payee,—*held*, that the judgment in that action was not a bar to a subsequent action on the note by the owner, who was not shown to have had notice of the pendency of that action.—*Lawrence v. Ware*. 477
2. *Same.*—The recovery of a judgment against a sheriff and his sureties, in an action on his official bond, by two joint owners of a chattel, for his wrongful acts in selling the entire interest in the chattel under execution against one of the joint owners, and in making the sale at a place not authorized by law, is a bar to a subsequent action of trover against him, by the joint owner who was not a party to the process, for the conversion arising from the wrongful sale of the entire interest; and the conclusiveness of the bar is not affected by the fact, that only nominal damages were recovered in that action; nor by the further fact, that the action itself was not strictly maintainable.—*Hopkinson v. Shelton*, 303

JUDGMENT AND DECREES—CONTINUED.

3. *Same, as evidence.*—On the execution of a writ of inquiry, after judgment by default, in trespass for taking personal property, the judgment by default estops the defendant from showing, even in mitigation of damages, that the plaintiff had not such a title as would authorize a recovery; yet he may show, in mitigation, that the plaintiff was not the owner of the property, as that fact is not necessarily inconsistent with the plaintiff's right to recover.—*Stewart's Executor v. Kaster*..... 404
4. *Conclusiveness of final decree.*—A decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of the administrator of an insolvent estate, and ascertains the amount of assets which had come to his hands, the amount of his disbursements, and the balance left in his hands for distribution among creditors; and by which "it is ordered, adjudged, and decreed," that the account, as stated by the court, "be received, passed, allowed, recorded and filed as a final settlement of said estate,"—is final and conclusive, until reversed by the proper tribunal, and can not be reviewed or annulled by the probate court at another term.—*Watt's Adm'r v. Watt's Distributees* 467
5. *Requisites of final decree.*—A decree of the probate court, which purports to have been rendered on final settlement of the accounts and vouchers of the administrator of an insolvent estate; which corrects certain supposed errors and mistakes in a former settlement, thereby showing a larger balance in the administrator's hands for distribution among the creditors, and declares the former settlement to be partial only; and by which "it is considered and decreed," that the claims allowed on the former settlement, which were then declared entitled to a dividend of eighty per cent., "be paid in full, and that whatever sums shall remain, after the satisfaction of said allowed claims, be equally divided among the four minor heirs of" the decedent,—has not the requisites of a final decree, and will not support an execution or an appeal. 467
6. *Decree in chancery construed as authorizing issue of *fi. fa.**—A decree in chancery, rendered on pleadings and proof, under a bill filed by the secured creditors, against the trustees in a deed of trust, charging them with waste, negligence, and misapplication of the assets; adjudging that the complainants are entitled to relief, and ordering the master to state an account of the several debts due to the complainants respectively, and the several amounts with which each trustee is chargeable, and to ascertain the *pro-rata* dividend of each creditor; and a subsequent decree, confirming the master's report,—though informal, are, when construed together and in connection with the bill and the master's report, equivalent to an order for the payment of the several sums of money ascertained to be due from each of the trustees to each of the creditors, and sufficient to authorize the issue of a *fi. fa.*—*McLemore v. Nuckolls*, 591
7. *Revoir; parties to *sci. fa.**—On the death of the nominal plaintiff in a judgment, a *scire facias* to revive it must be prosecuted in the name of his personal representative, and cannot properly be issued in the name of the beneficial plaintiff alone, nor in the name of the deceased nominal plaintiff.—*Baker, Fry & Co. v. Ingersoll* 416

JURISDICTION.

See CONSTITUTIONAL LAW, 3, 5, 6, 7.

CRIMINAL LAW, 53, 57.

DOWER, 3.

JUSTICE OF THE PEACE, 1.

JURORS.

1. *Competency of juror.*—The society of free-masons being a purely charitable corporation, a member of the society cannot be said to have the smallest pecuniary interest in the event of a suit to which the society is a party; consequently, he is a competent juror.—*Burdine v. Grand Lodge of Alabama*..... 355
2. *Same.*—A mere occupant and tenant, under a yearly letting, of a room used by him as a sleeping apartment, is not a *freeholder*, within the meaning of the statute (Code, § 3583) specifying the grounds of challenge to jurors in criminal cases.—*Aaron v. The State*..... 12
3. *Challenge of juror.*—In all trials for capital or penitentiary offenses, (Code, § 3585,) the State may, at its election, challenge for cause a juror who has a fixed opinion against capital or penitentiary punishments; yet the statute does not impose on the court the duty, *ex mero motu*, of setting aside a juror for this cause; nor can the prisoner complain if the State waives or forbears to exercise its right of challenge.—*Murphy v. The State*..... 48
4. *Oath of petit juror.*—If the jury, in a criminal case, are sworn "well and truly to try the issue joined," this is a substantial compliance with the requisition of the statute, (Code, § 3478,) and is sufficient.—*McGuire v. The State*..... 69

JUSTICE OF THE PEACE.

1. *Civil jurisdiction.*—Where several promissory notes, each for a less sum than fifty dollars, are executed at one and the same time, for a single debt amounting to the aggregate of their several sums, and are made payable on the same day, such notes are within the civil jurisdiction of a justice of the peace.—*Herrin v. Buckelaw*..... 570
2. *Authority of intendant of Camden as justice of the peace.*—The 4th section of the act "to incorporate the town of Camden in Wilcox county," (Session Acts, 1841, p. 54,) taken in connection with the act "to incorporate the town of Eutaw in Greene county," to which it refers, although it may not make the intendant of the town, *ex officio*, a justice of the peace, constitutes at least a valid foundation for a *bona-fide* claim of office by him; and if he proceeds to perform the duties of a justice of the peace, on the faith of his election as intendant, he is at least a justice *de facto*.—*Williamson & McArthur v. Woolf*..... 296
3. *Examination of parties as witnesses, in appeal case from justice's court.* In appeal cases from a justice's court, where the amount in controversy exceeds twenty dollars, the statute authorizing either party to be a witness in his own behalf, (Code, § 2779,) has no application to suits by or against corporations aggregate.—*Ala. & Tenn. Rivers Railroad Co. v. Oaks & Mills*..... 625

LEGACY AND DEVISE.

1. *Bequest to "heirs of the body" construed to vest in children as purchasers.*—Where the testator devised and bequeathed his entire estate, both real and personal, to his wife during life or widowhood, and directed that, on her death or marriage, his real estate should be sold, and all his property be divided into seven equal parts, "*and then disposed of as follows: to the heirs of the body of Sarah B. [his daughter] one part, she, the said Sarah, to have the use and benefit thereof during her life, but not to sell or dispose thereof,*" &c.; and it appeared that Sarah B. was married, and had children living at the time the will was made, and that the testator, in another clause of his will, bequeathed a specific sum in money to her directly, in the event that he did not make an advancement of equal amount to her during his life,—*held*, that the children of Sarah B., who were living at the death of the testator's widow, took as purchasers under the bequest, and that the rule in Shelley's case did not apply.—(STONE, J., dissenting)—Roberts and Wife v. Oghourne..... 129
2. *Bequest to daughter "during her life-time, and her heirs after her."*—A bequest of slaves and land to the testator's daughter, "to be her right and property during her life-time, and her heirs after her, together with their increase; but, should she die without an heir, then the property to be divided among the rest of my [his] heirs"; followed by a general residuary bequest to her, of all the rest of his estate, both real and personal, "to be disposed of as she thinks fit among my [his] lawful heirs at my [his] death,"—under the operation of the rule in Shelley's case, vests in the daughter an absolute estate in the slaves.—Parish v. Parish..... 51
3. *Bequest of estate for life, with remainder over; uncertainty; remoteness.*—"I will and bequeath to my beloved wife Elizabeth one negro woman, named Jane, to her her life-time; then she, and all her increase from the date '97, to be equally divided among the five children, if living at that time; if not, to their heirs lawfully begotten of their body; if none such heirs, to be equally divided among themselves when the youngest child comes of age; and after my wife's life-time, the wench to be hired to support her children; if her labor will not support her children, they must all help her, as they are to reap the property; and my desire is, that the children should be kept together, and schooled upon the hire of the negroes, until they come of age to demand them—the boys at twenty-one, the girls at sixteen years of age; and till then, the hire to go to the support of all the children, both black and white. My desire is, that if any of the children should die before it comes of age, they all should have his legacy equally divided among them; and if any one of the negroes die, they all shall make him equal with themselves." *Held*, that this bequest was not void for uncertainty, but created a life-estate in the widow, with remainder over to such of the testator's five children as might then be living, and the lineal descendants, then in existence, of those who were dead; and that the limitation in favor of such lineal descendants was not void for remoteness.—Fenton v. Smith..... 140
4. *Bequest construed to vest in children equal interest with widow to annual increase of property.*—Testator, by the first clause of his will, directed that all his property, both real and personal, should be equally divided

LEGACY AND DEVISE—CONTINUED.

- among his wife and three children, share and share alike; and that his entire estate should be kept together and managed by his executors, (who were also appointed guardians of his children,) until his eldest child, a son, should attain his majority, when his share was to be set apart to him; the share of each daughter to be allotted to her when she attained the age of twenty-one years, or married before that time with the consent of her guardians. The second clause was in these words: "It is my will and desire that, after all my just debts and liabilities shall have been paid, the said executors and guardians of my children shall pay over to my said wife, from time to time, as she may call for the same, such portion or part of the annual increase or profits of all my said property as she may desire; the remainder to be by them invested for the benefit of my said wife and children." The fourth clause directed his executors to sell a certain town lot, to purchase another suitable lot in the same village, and to have erected thereon a dwelling-house, "for the residence and benefit of my [his] said wife, after such plan, and in such style as she may desire and direct." The third clause directed the sale of the plantation on which he resided, and the fifth and sixth clauses a sale of certain personal property; while the seventh clause provided, that if the widow or any one of the children should die before the allotment to the latter of their respective shares, the survivors should take the interest of the deceased; and that if all the children should die before their respective shares had been allotted to them, then the widow should "have the proceeds and profits of all the property during her life." *Held*, that while the widow was entitled, under the second clause, to demand and receive from the executors the entire annual profits of the property after the payment of the testator's debts, she had no right to use them for the purpose of investment, or for her own exclusive benefit in any other manner: that the children took an equal interest with her in such profits, and were entitled to be maintained and educated by her out of such profits; and that, while she had a right to use and enjoy, in common with the children, the house and lot purchased by the executors under the fourth clause, the house and lot were the property of the estate, and subject to distribution under the first clause.—*Wynne and Wife v. Walthall*. 278
5. *Lapsed legacies; statutory provisions*.—Under section 1605 of the Code, a legacy or devise to a child or other descendant of the testator, who dies before the testator, leaving children or other descendants who survive the testator, does not lapse, and does not vest in the administrator of the deceased legatee or devisee, but passes directly to his children or other descendants, in the same proportions as if they took as his heirs-at-law or distributees; and his widow takes no interest in it.—*Jones v. Jones' Executor*. 574
6. *Validity of bequest of freedom to slave*.—In this State, a direct bequest of freedom to slaves is void, unless their emancipation is authorized by some special legislative provision; and where the testator is authorized, by a special statute, to emancipate his slaves at his discretion, but is required, as a condition precedent, previously to convey a certain quantity of land to the judges of the county court, in trust for their use,

LEGACY AND DEVISE—CONTINUED.

as a security that they shall not become a public charge, a devise of the land to the slaves themselves, in a will which is not sufficiently attested to pass real estate, is not a substantial compliance with the statute, and the bequest and devise are both void.—*Jack v. Duran's Executors*..... 222

7. *Validity of testamentary trust for emancipation of slaves at their election*.—A testamentary trust for the emancipation of slaves, the execution of which is made to depend on the election of freedom by the slaves themselves, is void, because they have not the legal capacity to make the election: and the same principle applies, where the executor is directed to carry the slaves, for the purpose of emancipating them, "to some non-slaveholding State, or to the republic of Liberia, as the said slaves may prefer."—*Cresswell's Executor v. Walker*..... 184

8. *Bequest to trustee, for comfort and support of debtor, but not liable for his debts, subject to equitable attachment*.—Where a sum of money is bequeathed to a trustee, in trust for a debtor, "not subject to any debt or debts he may have contracted, but for his comfort and support," it may be subjected by equitable attachment (Code, § 2956) to the payment of his existing debts.—*Smith v. Moore*..... 342

9. *Bequest to creditor, with direction for deduction of debt from legacy*.—Where the testator, after making certain specific bequests to his wife, directed that the residue of his property, both real and personal, should be divided into three equal parts, bequeathed one of these parts to the children of a deceased brother, and added to the bequest these words:—"but the amount I now am indebted to them is deducted,"—held, that this clause did not impose upon the children an abandonment of their debts against the estate, as a condition upon which they should take the legacy, but only required a deduction of the debts from the legacy; that in making this deduction, the aggregate amount of the debts must be subtracted from the entire legacy to the children collectively; and that the amount to which the children were entitled under the bequest must be ascertained as in cases where property is brought into hotchpot—that is to say, after deducting the specific bequests to the widow, the amount of the debts due to the children must be first added to the general residuum of the estate, and then deducted from one-third of that amount.—*Bush and Wife v. Cunningham's Executors*..... 327

10. *Proceeding for recovery of legacy; election*.—Where a residuary legacy contains a clause directing a debt due from the testator to the legatees, arising from the fact that he had made an unauthorized sale of their interest in a tract of land, to be deducted from the amount of the legacy; and some of the legatees are infants, and, consequently, incapable of electing to ratify the sale,—the chancery court alone can make an election for them, and is, therefore, the appropriate forum for the settlement of the estate and the ascertainment of the legacies..... 327

11. *Same; burden of proof*.—In a proceeding before the probate court, after the expiration of eighteen months from the grant of letters testamentary, for the recovery of a residuary legacy, from which is to be deducted, by the terms of the bequest, a debt due from the testator to the legatee, it is incumbent on the legatee, and not the executor,

LEGACY AND DEVISE—CONTINUED.

to prove the amount of the indebtedness to him; and unless he makes such proof, and thereby shows that there will be a sufficiency of assets remaining in the hands of the executor to pay all the debts, charges, and prior legacies, he is not entitled to a decree.—*Bush and Wife v. Cunningham's Executors*. 327

LIMITATIONS, STATUTE OF.

1. *When statute begins to run against decedent's estate*.—The statute of limitations does not begin to run against an intestate's estate until the appointment of an administrator; but it is not necessary that there should be a domestic administrator, when the intestate dies in a foreign State, and administration on his estate is there granted by the proper tribunal, although such foreign administrator may have never had his letters recorded here, as authorized to do by the act of 1821. (Clay's Digest, 227, § 31.)—*Milly's Adm'r v. Turnipseed and Wife*. 417
2. *Limitation of action for breach of title-bond*.—Under the law existing before the adoption of the Code. (Clay's Digest, § 27, § 81.) there was no statute of limitations applicable to an action for a breach of a vendor's title-bond.—*Bedell's Adm'r v. Smith*. 543
3. *Time, for overflowing land*.—Under the provisions of the Code, (§ 2481, subd. 6,) one year is the bar to an action to recover damages for overflowing lands.—*Polly v. McCall*. 246
4. *Same, for breach of contract*.—An action against the owners of a steamboat, for negligence arising from the breach of a contract, is not within the statute of limitations of one year. (Code, § 2481.)—*McGill v. Monette*. 285
5. *Same, to summary proceeding against tax-collector*.—The State not being expressly included in the act of 1832, (Clay's Digest, 329, § 90.) which prescribes six years as the limitation of actions against the sureties of public officers, that statute does not apply to a summary proceeding against a tax-collector and his sureties, instituted in the name of the comptroller of public accounts, for the use of the State.—*Ware v. Greene*. 383
6. *Same, to amended bill in chancery*.—If a bill is filed, by mistake, in the name of the wife as a feme sole, to recover her interest in slaves which accrued to her before her marriage, and which vested in the husband by virtue of his marital rights; and an amended bill is afterwards filed, in the name of the husband and wife, after the statute of limitations has barred the husband's right of action,—the statute is a bar to the relief sought, although the statutory bar was not complete when the original bill of the wife was filed.—*King and Wife v. Avery*. 124
7. *Subsequent promise or acknowledgment*.—To revive a debt barred by the statute of limitations, the subsequent promise, or acknowledgment, must be clear and explicit; but it is not necessary that the evidence, by which that promise or acknowledgment is established, should be clear and explicit.—*Strickland's Adm'r v. Walker*. 512

See, also, ADVERSE POSSESSION.

LUNATICS.

1. *Liability for necessities*.—An adult person, who is non compos mentis,

LUNATICS—CONTINUED.

- is liable on an implied contract for necessities furnished him, suitable to his estate and condition in life; and where no guardian has been appointed for him, an action for the value of such necessities must necessarily be prosecuted against him personally.—*Ex parte Northington*..... 400
2. *How lunatic must defend.*—When an action is brought against an adult person who is *non compos mentis*, he must be defended by an attorney, to be appointed by the court, if necessary; and if the court refuses to let the plaintiff proceed with his action, “unless he first have a guardian appointed by the probate court, and notify the guardian of the pendency of the suit,” a *mandamus* will be awarded by the supreme court, at the instance of the plaintiff, to compel the appointment of an attorney for the defendant..... 400

MANDAMUS.

1. *When it lies.*—In an action against an adult person who is *non compos mentis*, if the court refuses to let the plaintiff proceed with his action, “unless he first have a guardian appointed by the probate court, and notify the guardian of the pendency of the suit,” a *mandamus* will be awarded by the supreme court, at the instance of the plaintiff, to compel the appointment of an attorney for the defendant.—*Ex parte Northington*..... 409

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2. *Sale of mortgaged premises, under execution at law, for part of mortgage debt.*—In this State, a sale of mortgaged lands, under execution at law, for a part of the mortgage debt, passes no title or interest to the purchaser, unless there has been a previous surrender of the legal title by the mortgagee; and such surrender cannot be implied, in a court of law, from the facts, that he was present at the sale, made no objection to it, and afterwards received from the sheriff the proceeds of the sale; consequently, the lien of the mortgage is not thereby discharged, nor is the mortgagee, or a subsequent purchaser at the mortgage sale with notice of the facts, thereby estopped from recovering the land in an action at law..... 375
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- ent-unity; and the mortgage being then by extinguish-
 then be assigned to the surety on the new note for his individual liability,
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 not be granted by the probate court, on the application of the guardian

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of infants, without proof that the sale would be to the interest of the infants; but, when the application is made by adult part-owners, such proof is not necessary, although some of the parties interested are infants.—*Coker v. Pitts*. 624

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5. *Parties to summary proceeding*.—In a summary proceeding against a tax-collector and his sureties, (Code, §§ 2696–97, 2628, 2632,) for his failure to pay into the State treasury the taxes collected by him, the unexplained omission of one of the sureties from the notice is fatal to the proceeding.—*Ware v. Greene*. 333
6. *Parties to sci. fa.*—On the death of the nominal plaintiff in a judgment, a *scire facias* to revive it must be prosecuted in the name of his personal representative, and cannot properly be issued in the name of the beneficial plaintiff alone, nor in the name of the deceased nominal plaintiff.—*Baker, Fry & Co. v. Ingersoll*. 416

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12. *Same.*—A count which avers that the defendants, “maliciously and without probable cause, sued out a warrant, commonly called a peace-warrant against the plaintiff,” is in case for a malicious prosecution; and so is a count which avers that the defendants, “recklessly and without probable cause, through their agent and servant, caused and procured a peace-warrant to be sued out” &c., “on which said warrant plaintiff was arrested, and brought before the said justice of the peace, who, on hearing the evidence advanced by the defendants, discharged plaintiff from the arrest under said warrant;” but a count which avers that the defendants, “recklessly, maliciously, and without probable cause therefor, caused the plaintiff to be arrested and imprisoned, on a charge that he had threatened to injure and destroy the lives and property of the defendants, and that plaintiff was imprisoned by defendant for ten days,” &c., is in trespass for false imprisonment.—*Owsley v. M. & W. P. Railroad Co.* 485

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1. *Contract between trustee and cestui que trust.*—To subject a married woman's separate estate, created by deed or will, to the payment of a debt contracted by her with her trustee, or with a partnership of which he is a member, it is not enough for the complainant to aver and prove that "the articles were furnished by her express desire, under the faith and credit of her separate estate, and were suitable and proper to her condition in life:" he must repel the imputation of bad faith, which the law casts upon him, by showing that the prices charges were reasonable, and that he made no profit by the transaction.—*Cleveland v. Pellard*. 481
2. *Admissions of cestui que trust admissible against trustee.*—In an action brought by the trustee of a married woman, suing for her use, her admissions are competent evidence against him.—*McLemore v. Nuckolls*, 591
3. *Voluntary executory trust not enforced.*—A court of equity will not enforce, against the grantor or his personal representative, a purely voluntary executory trust in favor of a grand-child.—*Borum v. King's Adm'r*. . . . 524

USURY.

See CHANCERY, 6.

SURETIES, 2.

VENDOR AND PURCHASER.

1. *Adverse possession by purchaser, under color of title.*—Where a purchaser enters into the possession of land under a vendor's bond, conditioned to make title by a specified day, which must arrive before a part of the purchase-money is due by the terms of the contract, his possession can not be considered adverse to the vendor, until the day appointed for the conveyance of the title; and where such bond is executed by one who professes to act as the agent of several joint owners, for one of whom he has no authority to act, and is thus conditioned for the conveyance of title by them, the character of the purchaser's possession is the same as to all the owners.—*Ormond v. Martin*. 536
2. *Tender of deed, and eviction, as prerequisites to right of action on vendor's bond.*—Where the vendor has no title, and, for that reason, refuses to make a title when requested, the tender of a deed by the purchaser, to be executed, is not necessary to perfect his right of action on the title-bond; and an actual eviction of the purchaser is not necessary, since his right of action accrues as soon as the bond is broken by a failure to convey.—*Bedell's Adm'r v. Smith*. 548
3. *Admissibility of declarations of vendor and his administrator, showing refusal and inability to make title.*—In an action on a title-bond, against the personal representative of the vendor, the declarations of the vendor in his life-time, and of the defendant after his qualification as administrator, showing a refusal and inability on the part of each to make title, are competent evidence for the plaintiff. 548
4. *Limitation of action for breach of title-bond.*—Under the law existing before the adoption of the Code, (Clay's Digest, 327, § 81,) there was no statute of limitations applicable to an action for a breach of a vendor's title-bond. 548
5. *Partial satisfaction of bond.*—A deed, executed by the vendor at the re-

VENDOR AND PURCHASER—CONTINUED.

quest of the purchaser, conveying a part of the land embraced in the title-bond, with covenants of warranty, to a third person, may be accepted by the purchaser as a partial compliance with the condition of the bond; and being so accepted, its admissibility and validity are not affected by a mistake in the description of the land conveyed, nor by the fact that the vendor had no title to that part of the land. 548

WILLS.

1. *Probate of foreign will; necessity for.*—A foreign will must be proved to have been admitted to probate, before a certified copy of it can be received as evidence of title to personal property, or become admissible evidence under the act of congress of 1790.—*Jemison v. Smith*. 140
2. *Same; sufficiency and proof of.*—A transcript from the records of a court of ordinary, in Georgia, properly certified under the act of congress of 1790; containing a copy of a will, an affidavit beneath it by one of the subscribing witnesses, purporting to have been made before "J. Thigpen, J. P.," to the effect "that he believes he assigned his name at the last part of the within instrument of writing;" followed by an entry, stating that B. S. and J. S. were "sworn executors;" and other entries, showing that the persons so appointed discharged several executorial duties, and were recognized by the court as executors,—must, under the constitution and laws of that State, as proved in this case, be regarded as showing the probate of the will, and the appointment and qualification of the executors. 140
3. *Presumption of probate from lapse of time.*—Authorities cited on the question, whether the probate of a will, nearly sixty years old, would be presumed from lapse of time, under the circumstances of the case. . . . 140
4. *General rules of construction.*—In the construction of wills, all the parts are to be construed in relation to each other, so as to form, if possible, one consistent whole; and though the former of two inconsistent clauses must yield to the latter, yet this rule is only applicable after the failure of every attempt to give to both such a construction as will render them equally effective.—*Wynne and Wife v. Walthall*. 273
5. *Emancipation act of 1860 not retroactive.*—The act of February 25, 1860, "to amend the law in relation to the emancipation of slaves," (Session Acts 1859-60, p. 28,) does not affect wills which had been admitted to probate before its passage.—*Jones v. Jones' Executor*. 574
See, also, LEGACY AND DEVISE.

WITNESS.

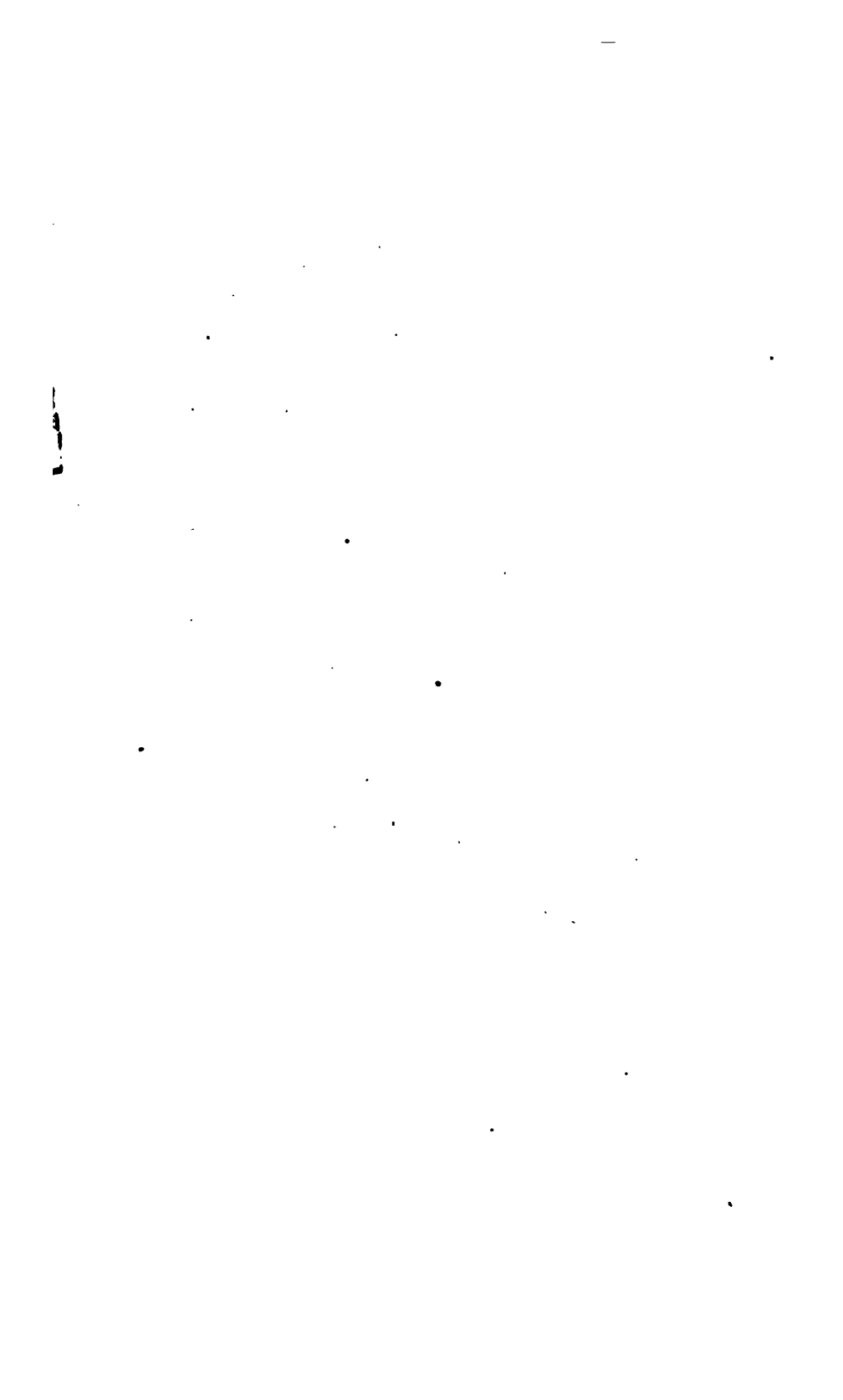
1. *Competency of corporator as witness for corporation.*—The society of freemasons being a purely charitable corporation, a member of the society cannot be said to have the smallest pecuniary interest in the event of a suit to which the society is a party; consequently, he is a competent witness for the society.—*Burdine v. Grand Lodge of Alabama*. 385
2. *Competency of distributee as witness for estate.*—On the death of a married woman, pending an action brought by her trustee for her use, a distributee of her estate is not a competent witness for the plaintiff.—*McLemore v. Nuckolls*. 591

WITNESS—CONTINUED.

3. *Competency of transferor as witness for transferee.*—A distributee of an estate, who is shown to have released to the other distributees his interest in the subject-matter of a suit brought by the administrator, in his representative character, is not incompetent as a witness for the plaintiff under section 2290 of the Code.—*Cotte v. Coate's Adm'r.*..... 627
4. *Competency of distributee as witness for administrator.*—But such distributee, notwithstanding such release, is not a competent witness for the administrator, on the ground of interest, although he might be rendered competent by a release of his entire interest in the estate..... 627
5. *Competency of witness as affected by interest.*—An obligor in a bond given under section 1691 of the Code, when administration is committed to the general administrator, the sheriff, or the coroner, conditioned for the payment of the fees and allowances made by the court on such administration, "if the property of the estate is insufficient therefor," is not, under section 2302 of the Code, incompetent as a witness for such administrator, in an action brought by him in his representative character..... 627
6. *Personal attendance of witness, and suppression of deposition.*—*Semble*, that the act "to compel the personal attendance of witnesses in civil cases," (Session Acts 1857-8, p. 34,) does not apply to a witness who is confined in jail under a judicial sentence; but, if the proper affidavit has been made, and the attendance of the witness can be procured, the deposition ought to be suppressed.—*Webb v. Kelly.*..... 349
7. *Release of surety on detainee bond, and examination as witness.*—The surety on a detainee bond may be released, and examined as a witness for his principal, on the execution by the latter of a new bond, with other good and sufficient sureties; but it is not permissible to erase the surety's name from the bond, against the objection of the obligee, and substitute the name of another surety in his stead..... 349
8. *Competency of plaintiff, in action against common carrier, to prove contents and value of lost baggage.*—In an action against a railroad company, as a common carrier, to recover damages for the loss of passenger's baggage, the plaintiff may prove the contents and value of his trunk by his own oath.—*Douglass v. M. & W. P. Railroad Co.*..... 566
9. *Examination of parties as witnesses, in appeal case from justice's court.* In appeal cases from a justice's court, where the amount in controversy exceeds twenty dollars, the statute authorizing either party to be a witness in his own behalf, (Code, § 2779,) has no application to suits by or against corporations aggregate.—*Ala. & Tenn. Rivers Railroad Co. v. Oaks & Mills.*..... 625

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